

To be argued by  
FELIX C. BENVENGA.

## Supreme Court of the United States

OCTOBER TERM, 1926.

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No. 261  
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Office Supreme Court, U.  
FILED

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WM. R. STANSBURY  
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TYSON AND BROTHER-UNITED THEATRE TICKET  
OFFICES, INC.,

*Appellant,*

*against*

JOAB H. BANTON, as District Attorney of the County of  
New York, State of New York, and VINCENT B.  
MURPHY, as Comptroller of the State of New York,

*Appellees.*

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### BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

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FELIX C. BENVENGA,

*Solicitor for Appellee, Joab H. Banton,  
District Attorney of the County of  
New York.*

FELIX C. BENVENGA,  
ROBERT D. PETTY,  
EDWIN B. MCGUIRE,  
*of Counsel.*



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**Supreme Court of the United States,**  
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TYSON AND BROTHER—UNITED THEATRE  
TICKET OFFICES, INC.,  
Appellant,

*against*

JOAB H. BANTON, as District Attorney of the  
County of New York, State of New York,  
and VINCENT B. MURPHY, as Comptroller  
of the State of New York,  
Appellees.

No. 261.

**BRIEF FOR APPELLEE JOAB H. BANTON,**  
**as District Attorney, etc.**

**Statement.**

This is an appeal from a decree or order of the District Court of the United States for the Southern District of New York, entered December 12, 1925, denying an application for a temporary injunction to restrain the above-named appellees from bringing or permitting to be brought any

proceeding at law or in equity for the purpose of enforcing Chapter 590 of the Laws of 1922 of the State of New York (General Business Law [Cons. Laws, Chap. 20], §§167-174), upon the ground that the said statute and each and every part thereof is unconstitutional and void.

### **The Statute Involved.**

By Chapter 590 of the Laws of 1922, the General Business Law of the State of New York [Consol. Laws, Chap. 20] was amended by inserting therein a new article, as follows:†

#### **“ARTICLE X-B.**

##### **THEATRE TICKETS.**

§167. MATTERS OF PUBLIC INTEREST. It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§168. RESELLING OF TICKETS OF ADMISSION; LICENSES. No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without

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† The statute is copied in the margin of this Court's opinion in *Weller v. New York* (268 U. S., pp. 322-324).

having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

§169. BOND. The comptroller shall require the applicant for a license to file with the application therefor a bond in due form to the people of the State of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the State of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction, and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the State.

§170. REVOCATION OF LICENSES. In the event that any licensee shall be guilty of any fraud or misrepresentation

or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

§171. SUPERVISION OF COMPTROLLER. The comptroller shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

§172. RESTRICTION AS TO PRICE. No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusements or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

§173. VIOLATIONS; PENALTIES. Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of

a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

§174. CONSTITUTIONALITY OF ARTICLE. In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article."

This act became a law April 12, 1922.

### **Introductory.**

The question of the constitutionality of this statute has already been before the courts for decision. The Court of Appeals of the State of New York has upheld it in its entirety (see *People v. Weller*, 237 N. Y. 316; affg. 207 App. Div. 337), and this Court has upheld it in part (see *Weller v. New York*, 268 U. S. 319). A lower New York court—the Court of General Sessions of the County of New York—had previously nullified a city ordinance substantially similar to the statute herein involved (see *People v. Newman*, 109 N. Y. Misc. 622). And although the judgment of the lower court was affirmed upon appeal, the affirmance was upon the ground that error was committed in the exclusion of evidence; the Appellate Division specifically holding, so far as the constitutional point was concerned, that, "For the reasons stated in *People v. Weller* (207 App. Div. 337), decided herewith, we reject the reasoning advanced in the Court of General Sessions so far as it is intended to show that there was no power to adopt the ordinance in question" (see *People v. Newman*, 207 App. Div. 354).

The statute contains two salient provisions:

(1) It prohibits persons from reselling or engaging in the business of reselling tickets of admission to theatres and other places of amusement, unless they first obtain a license from the State Comptroller (Gen. Bus. Law, §168).

(2) It places a restriction upon the amount which said licensees may charge the public for such tickets—they may not charge more than 50 cents in excess of the price printed on the face of the tickets (*Id.*, §172).

In the *Weller* case (*supra*), it was contended by counsel for Weller that these provisions were inseparable; that the provision which undertook to restrict the resale price (§172) was clearly invalid, and that, consequently, the whole statute would have to fall. As counsel for the People, we maintained that the power of the State to require licenses from persons engaged in the aforesaid business was clear, and that, strictly speaking, the question of the validity of the price-restriction provision of the statute was not involved.

This Court upheld the contentions of the People. It decided: (1) That the State had power to require licenses of those engaged in the aforesaid business; and (2) that, in the absence of an authoritative announcement of another view by the courts of the State, it would hold the license provision separable from the price-restriction provision.

It will be observed, therefore, that although the statute has been upheld in its entirety by the Court of Appeals, the validity of the price-restriction provision is the only question now open for decision by this Court.

We may add that, following the decision of the Court of Appeals in the *Weller* case (*supra*), the Justices of the Supreme Judicial Court of Massachusetts, in an opinion rendered to the General Court of the Commonwealth, ad-

vised that if the legislative authority of the State should find that prices and other conditions attending the sale of tickets of admission to theatres and other public places of amusement requiring a license, are matters affected by a public interest, and that legislation is necessary for the protection of the public against fraud, extortion and similar abuses in connection therewith, a statute which would provide for a price limit, reasonably calculated to prevent extortion, but affording a reasonable profit to persons engaged in the resale of tickets to public places of amusement, might constitutionally, be enacted (*Opinion of Justices*, 247 Mass. 589; 143 N. E. 808).

### **The Facts.**

1. The bill of complaint asserts that the plaintiff (the appellant herein) has duly complied with the provisions of the statute herein involved, by filing the bond prescribed therein, and by obtaining from the Comptroller of the State of New York the necessary license to engage in the business of the re-sale of theatre tickets. The complaint then prays that a temporary injunction be granted enjoining the defendants (the appellees herein) from bringing or permitting to be brought any proceeding at law or in equity for the purpose of enforcing the provisions of the said statute, upon the ground that it is

“unconstitutional and void and each and every section thereof is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiff [appellant] of its liberty and property without due process of law and of the equal protection of the law” (R. 7).

2. In support of the application, the plaintiff submitted the affidavit of David Marks, its president (R. 17-22). (This affidavit embodies allegations substantially similar to those contained in the bill of complaint [cf. R. 1-8; 17-23].)

(a) Attention is called to the fact that there is no allegation in Marks' affidavit that the charge permitted by the statute is not a fair, adequate and reasonable compensation for the service rendered by the plaintiff or other licensees. (Nor, we may add, is there any allegation in the bill of complaint to that effect.)

Marks' affidavit, however, contains this statement: That "by reason of the heavy costs of its overhead *and* cost of delivering tickets *and* the cost of obtaining tickets *at a premium* for resale to its customers, plaintiff is frequently unable to sell tickets except at a loss" (R. 21).

But this statement, apparently, has reference to the plaintiff's "frequent" practice (also mentioned in Marks' affidavit) of buying tickets in the open market from speculators and paying them a price (as set forth in Marks' affidavit) "in excess of the price printed upon the face of the ticket" (R. 19).

It goes without saying that, if the plaintiff buys tickets from speculators at a price 50 cents *in excess* of the price printed upon the face thereof, it cannot legally resell such tickets except at a loss.

Furthermore, it would seem to us—assuming, of course, the constitutionality of the statute—that a person who buys a ticket at a price in excess of that authorized, for the purpose of afterwards reselling the same ticket at a price in excess of that authorized, is aiding and abetting the violation of the statute, and is, together with the person

from whom he bought the ticket, guilty of crime (N. Y. Penal Law [Laws 1909, Chap. 88], § 2).

In answer to Marks' affidavit, we submitted the affidavits of John McBride, the Treasurer of the McBride Theatre Ticket Offices, Inc., and John L. McNamee, the President of Tyson & Co. These companies are two of the largest theatre ticket agencies in the City of New York.

The affidavits of McBride and McNamee show that the advance of 50 cents permitted by the statute is a fair, adequate and reasonable compensation for the service rendered by ticket brokers (R. 54-55, 56).

The affidavits of McBride and McNamee also show that their respective companies have, since the enactment of the statute, discontinued the practice of buying tickets for customers in the open market; that their business has not suffered in consequence of it; but, on the contrary, it is thriving and increasing annually (R. 54, 56).

(b) In his affidavit, Marks states that approximately one-half of the tickets dealt in by his company are subscribed for by it before the opening of the performance, and "frequently" before the performance has even been cast; that such subscriptions must be made eight weeks in advance, and must be paid for two weeks in advance; that, if plaintiff fails to sell these tickets, it is allowed no more than 25% of them, and that "sometimes the theatres charge a premium on the tickets so purchased" (R. 19-20).—In other words, the impression sought to be created is that the theatre ticket brokers "finance" the theatrical performances and are compelled to buy tickets. At least, this was Marks' testimony in the *Weller Case* (R. 37).

The affidavits of McBride and McNamee state that no pressure is exerted upon their companies to purchase any

tickets for any performance, and that they are permitted to use their own discretion and subscribe for and purchase what number of tickets they please and whenever they please (R. 54, 56). So, that if the statements contained in Marks' affidavit are correct, his company is being discriminated against, and, if, in addition, his company is being mulcted out of a "premium", the crime of extortion (N. Y. Penal Law, §850; *People ex rel. Short v. Warden*, 145 App. Div. 861, affd. 206 N. Y. 632), or that of violating the "anti-tipping" statute (N. Y. Penal Law, §439), is being committed, or both.†

(c) Marks' affidavit also alleges that, during the three years last past, plaintiff's loss for unsold tickets averaged \$70,210, or a total of 18,230 tickets (R. 20). There is, of course, no way by which we can verify these figures. We are informed, however, that these figures show a loss out of all proportion to that sustained by the large agencies (R. 31-32).

Assuming, however, that they are correct, they merely go to show that the plaintiff conducts its business either improvidently or (perhaps) illegitimately—that it retains more tickets than it can dispose of, perhaps for the purpose of speculation, after the time within which they may be returned to the theatres; or that it is obliged to retain a large number of such tickets, in order to live up to its contracts to supply customers with choice seats at very short notice (probably a violation of the statute), for which

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† The District Attorney believes, as Marks states, that the theatres sometimes do charge "a premium" on tickets purchased by ticket brokers or speculators—especially where there is a large demand for these tickets, and the ticket brokers and speculators are charging exorbitant prices in excess of the fifty cents permitted by the statute. This is the abuse that the ordinance declared valid in *People ex rel. Court Theatre Co. v. Thompson* (283 Ill. 87, 119 N. E. 41) was designed to remedy (*vid. pp. 23-24, infra*).

it receives large extra compensation. (The existence of these contracts is referred to in the affidavit of the District Attorney, submitted below [R. 28 *et seq.*].)

(d) In this connection, we desire to point out that the allegations in Marks' affidavit, with reference to the volume of the plaintiff's business and its receipts, expenses and losses, are, to say the least, grossly misleading. Marks states that the plaintiff sells 300,000 tickets a year. This would legitimately net the plaintiff a gross income of \$150,000. As against this, Marks sets forth expenses and losses as follows: Rent, salaries, &c., \$58,630; unsold tickets (already referred to), \$70,210; miscellaneous losses, \$5,000; making a total in all of \$133,840 (R. 18-19). So that, by implication, at least, Marks would have the Court believe that the plaintiff's net yearly profits average \$16,160, and that the effect, therefore, of the price-restriction feature of the statute is to deprive the plaintiff of a fair and reasonable profit on its investment. But, as we have already pointed out, there is no specific allegation in Marks' affidavit or in the bill of complaint to that effect (*vid.* p. 8, *supra*).

And, as we have also pointed out, the plaintiff's sources of revenue (according to the District Attorney's information, which information is embodied in the affidavit submitted below) are not confined to the fifty cents on each ticket resold authorized by the statute. The plaintiff has, as already set forth, an income (probably, illegitimate) derived from contracts, by which it, in effect, guarantees to supply customers with choice seats at very short notice (R. 30-31).

So, also, according to the District Attorney's information, the plaintiff has another source of revenue (perhaps,

legitimate). It exacts what is known as a "service" charge to customers who carry a charge account. This charge is for the extra service of carrying the account, keeping books, &c., &c. (R. 31). According to Marks' affidavit, one-half of the plaintiff's business is conducted on this basis (R. 18). The existence of this "special service department" is admitted in Marks' reply affidavit (R. 24). And, of course, there may be other sources of revenue (legitimate or illegitimate), concerning which we have no direct knowledge or information.

We may, in this connection, confess the quite obvious fact that it has been a difficult matter for the District Attorney to obtain any information concerning either the theatrical business or the ticket brokerage business. He has reason to believe that there are other evils and abuses connected with these businesses which may have been known to the Legislature, but of which he has no direct knowledge or information.

3. In opposition to the motion, we also submitted Marks' testimony in behalf of the defendant upon Weller's trial in the Court of Special Sessions in the City of New York (R. 34, *et seq.*). His testimony on direct-examination shows the manner in which the ticket brokerage business is conducted and the intimate relationship between persons engaged in that business and those conducting the theatres. He testified:

"Q. Whom do you get these tickets from? A. Theatre managers.

"Q. How do you get them from the theatrical managers? A. *We buy them in blocks, each office is allowed so many seats.*

"Q. The theatrical managers put on a production, whatever the play may be? A. Yes, sir.

"Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production? A. Yes, sir.

"Q. When is that part of the arrangement made? A. Before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

"Q. Who sends for you? A. The managers of the various productions" (R. 34-35).

"Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place? A. Yes, sir.

"Q. What is the nature of the conversation? A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance? We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the show or the cast, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

"Q. *In other words, you finance the theatrical performance?* A. Yes, sir.

“Q. And you have to pay in advance? A. Yes, sir, and it takes hundreds of thousands of dollars.  
• • •

“Q. And because you are bound to pay this amount, it is a dead loss if you cannot sell the tickets? A. Yes, sir; a loss of thousands of dollars on a production” (R. 37-38).

(a) Marks' direct testimony also shows a monopoly—the control by a few persons engaged in the ticket brokerage business of approximately one-half of the choicest tickets.

“Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office? A. No, sir. *The best they could get for any show is the fifteenth or sixteenth row.*

“Q. The best seats have been sold? A. The choice seats.

“Q. If anyone desires to go to the theatre for them at night, they would be far back in the house? A. Yes, sir” (R. 41).

On cross-examination:

“Q. How many ticket speculators are there? A. Ticket brokers?

“Q. Yes, how many? A. Tyson & Co.† have 18 branches, would you call it one office, or call each branch an office?

“Q. Call each branch a separate office? A. About 30 offices.

“Q. There are 30 offices where you can buy tickets from ticket brokers? A. Yes, sir.

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† The affidavit of John L. McNamee, the president of Tyson & Co., was submitted by the District Attorney in answer to Marks' affidavit (R. 55-56, and *vid, supra*).

"Q. And they are controlled by how many people? A. Probably a dozen or fifteen. \* \* \*

"Q. Have you heard how many tickets are sold by the brokers in a year? A. Approximately 2,000,000 tickets.

"Q. And that would be at least 50 per cent. of the desirable seats in the theatre? A. In the downstairs only" (R. 44-45).

(b) Marks' direct testimony also shows that the advance of 50 cents permitted to be charged by the statute is fair, adequate and reasonable.

"Q. Do you have an established rate of profit? A. It is fifty cents, we are not allowed to charge more.

"Q. You have charged more in some cases? A. We charge fifty cents for every ticket we handle.

"Q. What you have said as to the method of doing business is practically the same in all cases? A. Yes, sir.

"Q. Are there cases when you do charge more than fifty cents? A. Yes, sir.

"Q. Explain? A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service (R. 39).

On cross-examination:

"Q. How many people interested in your business? A. Myself, Mr. Tyson and Mr. Kiesel.

"Q. How many tickets do you sell per year? A. Over one thousand tickets a day.

"Q. That would be over 300,000 tickets a year? A. Yes, sir.

"Q. Your concern has not gone into bankruptcy? A. No, sir.

"Q. It has made money? A. *Made a comfortable living*" (R. 44).

"Q. You say, you sometimes charge over 50 cents? A. Yes, sir.

"Q. In what percentage of the tickets that you sell would that happen? A. Ten tickets a day, or twenty tickets a day.

"Q. Not any more? A. Yes, sir, and many days none at all.

"Q. The occasion for charging more than 50 cents is because you have to go outside and pay more for the tickets? A. Yes, sir, right" (R. 46).

"Q. About how many out of the 300,000 seats that you sell? A. I don't think it would not exceed 5,000 or 10,000" (R. 47).

Concerning the McBride agency, he testified:

"Q. McBride is one of the largest? A. Yes, sir.

"Q. And he sells approximately how many tickets a year? 500,000 tickets a year? A. I think so.

"Q. And his rate is fifty cents over the amount printed on the ticket? A. Yes, sir.

"Q. He has not gone into bankruptcy? A. Not that I heard of.

"Q. He has been doing business for 45 years? A. Yes, sir" (R. 45).

### **The Question Involved.**

The question for this Court to determine is whether the Legislature, in the exercise of its police power, has the right, under the circumstances disclosed by the record, to restrict the price at which theatre tickets may be resold.

In general, we contend that, because the business of reselling theatre tickets is "affected with a public interest", the Legislature, in the exercise of its police power, had the right (and, indeed, it was its duty under the circumstances disclosed by the record) to fix the price at which theatre tickets might be resold by ticket brokers or speculators; and, as the price so fixed is sufficient to yield a fair, adequate and reasonable profit or return for the services rendered, the statute is not unconstitutional.

## POINT I.

**Regulation is warranted because abuses exist in the business of reselling theatre tickets.**

1. To show the manner in which the business of reselling theatre tickets is conducted; the intimate relationship between persons engaged in operating theatres and those engaged in reselling theatre tickets; the control by "a dozen or fifteen" brokers of approximately two million theatre seats a year, or at least half of the choicest tickets, and the existence of fraud, extortion, exorbitant rates and similar abuses in the business, we submitted to the Court below the testimony of David Marks, the president of the plaintiff-appellant herein, who had testified as a witness in behalf of the defendant in the case of *People v. Weller* (R. 34-48), together with certain answering affidavits and exhibits thereto annexed (R. 28-56).

Commenting on Marks' testimony, the Court of Appeals said [*People v. Weller, supra*, at pp. 326-327]:

“Under these circumstances it cannot be doubted that when ticket brokers or speculators are permitted to charge any price which they can obtain from a buyer upon the resale of tickets of admission, abuses are not only reasonably to be feared, but actually exist.”

The Court further said [at p. 331]:

“The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest.”

The Appellate Division found that there was “ample evidence” that the calling of the ticket speculator has been associated with certain abuses (*People v. Weller, supra*, at p. 339); and after quoting at some length from Marks’ testimony (at pp. 347-348), observed:

“The method now pursued in the disposal or resale of tickets was described at the trial. It is interesting in that it shows a community of interest between the theatre managers and the brokers who sell to the public, or an underwriting of the attraction by the speculator for which the public must pay.  
\* \* \* This testimony gives an idea of the theatre ticket business which is carried on by the brokers, and how intimately connected it is with that of the theatre and theatre owners and managers. It is apparent from this record that the theatres and ticket brokers have an understanding or arrange-

ment for the resale of tickets. *The modern method of selling tickets indicates that there is a working agreement between the managers or owners, and the speculator or ticket brokers."*

In *Opinion of Justices (supra)*, the Court said:

"It may be presumed that facts found in actual trials in courts in other states are found to exist in kind in this commonwealth. See, for example, *People v. Weller*, 237 N. Y. 316, 326, 329. An attempt to safeguard the public against fraud and extortion in connection with sales of tickets to theatres and places of amusement cannot be pronounced vain. Strangers or sojourners may be thought peculiarly liable to abusive practices in this particular. *Moreover, it may be that there has been found to be collusion between the management and those engaged in resale."*

Commenting on Marks' testimony, the Court below said [R. 60-61]:

"Under such a state of affairs, it is but natural that tickets for the most desirable seats should pass into the hands of the brokers. The seating capacity of theatres showing popular and successful productions is distinctly limited, and the practice just referred to tends towards a monopolistic control of the ticket business by the brokers. Standing as he does to lose money on an unsuccessful play, the broker's reasonable course of procedure is to take full benefit of his control of the market for desirable tickets, and to exact from the theatre-going public the largest price per ticket that it can be induced to pay. Nor is there the least assurance that the price obtained from two or more patrons for seats of the same quality will be the same. \* \* \* Obviously, the oppor-

tunity for fraud and extortion is much greater when ticket brokers are permitted to procure a large proportion of the desirable seats for a number of attractions, and are moved not only by the desire to make a fair profit on the tickets they control for particular performances, but are likewise concerned with the purpose of overcoming, at the earliest possible moment, the speculative risk that they have assumed with regard to the success with which the plays may meet over a substantial period of time yet to come."

In the opinion below, it is also said [R. 60-61]:

"No person, at all familiar with theatrical conditions in this city, can say that the legislature, in enacting the statute under attack, was without facts upon which to base its determination that it was desirable from a governmental standpoint, to safeguard the theatre-going and amusement-seeking public, against fraud, extortion, exorbitant rates and similar abuses."

2. Furthermore, as the distribution of tickets is very largely in the hands of ticket brokers and speculators, it is easy to see that they have many opportunities for practicing fraud upon and deceiving the public. They might sell tickets to persons for seats already sold to others. They might discriminate against particular persons or classes of persons. They might sell tickets for places of amusement that are closed or for shows that are not running. They might deceive purchasers as to the location of the seats. And their businesses being generally conducted at places distant from theatres, purchasers will very often have difficulty in obtaining redress. Concerning this, the Appellate Division said [*People v. Weller, supra*, at p. 342]:

“Ordinarily tickets are not resold at the theatre. One purchasing from a speculator must rely upon him in many respects. If the speculator is dishonest he may sell tickets which will not be honored at the theatre, or tickets for which there is no production to be seen. The purchaser is not on an equal footing with the speculator, and this gives the public an interest in seeing that those engaged in that occupation are persons of character suited thereto, and also in having safeguards provided which will insure protection to the public as well as an adequate remedy to those defrauded.”

3. GOVERNOR MILLER, when signing the act now under consideration, gave expression to a popular sentiment when he said that the bill was aimed at “an undoubted abuse” (see *People v. Weller*, 207 N. Y. App. Div., at p. 339).

In passing the bill, the Legislature said that there was a great necessity therefor. By §167, it “declared and determined” that the law was necessary “for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.”

4. Indeed, for many years, the evils attendant upon theatre ticket speculation in Greater New York have been recognized, and various efforts, both public and private, have been exerted in an endeavor to minimize or eliminate them (*Collister v. Hayman*, 183 N. Y. 250, 254; *People v. Weller*, 237 N. Y., at p. 327). An instance of a private effort to do so is recorded in *Collister v. Hayman* (*supra*). There, the proprietor of a theatre attempted to protect his patrons from paying extortionate prices by a clause declaring tickets void if resold on the sidewalk. In upholding the validity of this clause, the Court said [at p. 254]:

"A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, *but must leave his patrons to the mercy of speculators*, such as the plaintiff, who, as he alleges, was accustomed to make at least \$4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the city of New York are equally successful, the additional expense to theatre-goers must be very large."

5. Further evidence of abuses which flow from the business of reselling theatre tickets is furnished by the legislation that has been passed in a number of States other than New York, aimed at improving the condition surrounding the sale and distribution of tickets.

In 1905, California passed a statute (St. 1905, p. 140, ch. 140), prohibiting any person from selling tickets to theatres or other public places of amusement, for a price higher than that originally charged by the management of such amusement places. This act was held void as infringing on the right of property guaranteed by the Constitution and not a valid exercise of the police power of the State,

in that it prohibited an act which was innocent in character, and which had no tendency to affect, injure or endanger the public health, morals or safety.

*Ex parte Quarg*, 149 Cal. 79; 84 Pac. 766.

In 1907, Illinois passed a statute (L. 1907, p. 269), substantially similar to the California statute (*supra*). It prohibited the sale of theatre tickets not having thereon the words, "This ticket cannot be sold for more than the price printed thereon", and further prohibited the demanding and receiving therefor a price in excess of the printed rate. On the authority of *Ex parte Quarg* (*supra*), this act was held invalid.

*People v. Steele*, 231 Ill. 340; 83 N. E. 236.

*City of Chicago v. Powers*, 231 Ill. 560; 83 N. E. 240.

In 1915, Chicago passed an ordinance providing that every ticket of admission to a theatre shall have printed upon its face the price thereof, and prohibiting any theatre company, or officer, manager or employee thereof, from receiving, directly or indirectly, any consideration of any nature whatsoever, upon the sale of any such ticket beyond or in excess of the price designated thereon, or from entering into any arrangement or agreement for the receipt of such consideration. This ordinance was held to be Constitutional and a valid exercise of the police power, and the *Quarg*, *Steele* and *Powers* cases (*supra*), were distinguished upon the ground that the purpose of the statutes therein involved "was to destroy a business not injurious to the public welfare, by prohibiting a broker from making a profit."

*People ex rel. Cort Theatre Co. v. Thompson*,  
283 Ill. 87; 119 N. E. 41.

In 1920, San Francisco passed an ordinance which declared unlawful the sale of any theatre ticket, opera ticket, or ticket of admission to a place of amusement or entertainment, at any place other than the office of the management of the theatre, place of amusement or entertainment, unless the seller should first procure a "Ticket Peddler's License", and pay a fee of \$300 monthly therefor. Citing with approval *Ex parte Quarg (supra)*, it was held that the ordinance was not a justifiable revenue measure, and that as an exercise of the police power, it was an "unwarrantable interference with the liberty of citizens, not based upon any reasonable consideration of the public welfare, morals or safety, nor of the cost of police supervision."

*Ex parte Dees*, 31 Cal. App. 815; 189 Pac. 1050.

The statute involved, as we have already pointed out, was passed in 1922.

During 1923, at least three states passed statutes relating to the sale of tickets to places of amusement: *i. e.*,

Illinois, L. 1923, p. 323.

New Jersey, L. 1923, p. 143, ch. 71.

Connecticut, L. 1923, ch. 48.

The Illinois statute made it unlawful for any theatre or other public place of amusement to sell tickets at any place other than its box office or on the premises, except at the same price at which such tickets were sold at the box office or on the premises.

The New Jersey statute made it unlawful to sell or dispose of any ticket of admission to any theatre or other pub-

lie place of amusement or entertainment at or for a price in excess of that printed on the face thereof.

The Connecticut statute made it unlawful to sell any ticket of admission to any place of public amusement given under the auspices of an educational institution at a price greater than the price of admission to such place of public amusement.

The validity of these statutes has not, so far as we know, been passed upon.

During 1924, while a bill similar to the New York statute now under consideration was pending in the Massachusetts Senate, the advice of the Justices of the Supreme Judicial Court of that State was sought on the constitutionality of the bill. In a carefully considered opinion, in which the opinion of the New York Court of Appeals in *People v. Weller* (237 N. Y. 316), was cited with approval, the Senate was advised that the bill, if enacted into the law, would be constitutional.

*Opinion of Justices*, 247 Mass. 589.

Thereafter, an act was passed, containing the substantial features of the proposed bill. See:

*Acts and Resolves of Massachusetts for 1924*,  
ch. 497, p. 551.

6. The conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare as to require legislative regulation, cannot have been accidental and without cause.

*German Alliance Ins. Co. v. Lewis*, 233 U. S.  
389, 412.

Presumably, these various law-making bodies, after investigation, determined that the business should be regulated.

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments" (*McLean v. Arkansas*, 211 U. S. 539, 547), and this court "ought to be very slow to declare that the state legislature was wrong on the facts" (*Patson v. Pennsylvania*, 232 U. S. 138, 144).

In *Radice v. New York* (264 U. S. 292), which involved the constitutionality of a statute prohibiting the employment of women in restaurants between certain hours was upheld, the Court said [p. 294]:

"Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state Legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination."

To the same effect, see:

*Jones v. City of Portland*, 245 U. S. 217, 221.

*Block v. Hirsh*, 256 U. S. 135, 154.

*Armour v. North Dakota*, 240 U. S. 510, 513.

*People ex rel. Durham v. La Fetra*, 230 N. Y. 429, 440.

*Schieffelin v. Hyman*, 236 N. Y. 254, 264-265.

Again, in determining whether local conditions justify state legislation, this Court should not only give great weight to the estimate of the state Legislature as to the existence of evils, but should give a cumulative effect to the recognition of the courts of the same state that those evils exist.

In *Green v. Frazier* (253 U. S. 233), the Court said [at p. 242]:

“Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this Court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.”

To the same effect, see:

*Jones v. City of Portland*, 245 U. S. 217.

7. In *People v. Newman* (109 N. Y. Misc. 622), which invalidated a city ordinance substantially similar to the statute under consideration, the Court admitted that there was “evil flowing from this business”, and that it “should be corrected”; but seemed to think that the evil could only be remedied by theatrical managers (at pp. 660-661).

But, as the Appellate Division pointed out in *People v. Weller* (*supra*): “The managers of theatres profess to be unable to cope with the evil, asserting that they have made efforts to do so” (at p. 339); and that, furthermore: “The

hope or expectation that the abuses or evils in theatre ticket speculation may be remedied by the producing managers is dispelled by the testimony in this case" (at p. 347).

A more complete answer is that of the Court of Appeals: "The correction of recognized abuses need not be left to the voluntary action of the very group of men who have created the abuse and who apparently believe that the continuance of such abuses will profit them" (*People v. Weller, supra*, at pp. 329-330).

Furthermore, to concede that the only cure for the evil is some remedy initiated by the managers of the theatres is to admit that the State is powerless to promote the general welfare of the people and to accomplish the purposes for which governments are founded (see *People ex rel. Durham v. La-Petra*, 230 N. Y. 429, 442, 443; *People v. Weller*, 207 App. Div., at p. 343).

## POINT II.

**The business of reselling theatre tickets is affected with a public interest, and may be regulated.**

The fundamental principles governing the question involved are simple and familiar.

A State Legislature may, acting under its police power, regulate prices and charges. But the extent to which regulation may reasonably go depends upon the nature of business—whether it is "affected with a public interest"; the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like. This power of regu-

lation is not a power to destroy. A State Legislature may not, therefore, compel persons engaged in the business to lend their services without reward. Nor may it establish regulations obviously unjust or discriminating (*vid.* cases cited at p. 38, *infra*).

1. The business of conducting a theatre, though in one sense private, is not "strictly" private; it is a business that is "affected with a public interest" (*People v. King*, 110 N. Y. 418, 427; *Aaron v. Ward*, 203 N. Y. 351, 356; *People v. Weller*, 237 N. Y., at p. 322; *People ex rel. Cort Theatre Co. v. Thompson*, 283 Ill. 87; 119 N. E. 41; *Opinion of Justices*, 247 Mass. 589, 595). "The courts have frequently pointed out that the business of conducting a theatre or place of public amusement is 'affected with a public interest' " (*People v. Weller, supra*). And it is because the business is affected with a public interest that governmental regulation is justified (*vid.* cases just cited).

That the business of conducting a theatre is affected with a public interest is very evident when the purposes of the theatre are considered. Theatres are operated to furnish recreation and amusement to the public. They are the chief means of recreation which the people have after cessation from their daily labors. The theatres afford that relaxation of mind which is conducive to health, comfort and good morals.

There is also another important function of the theatre in that it promotes public education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore, the theatre becomes more essential

to the welfare of the public; it becomes more "affected with a public interest."

*People v. Weller*, 207 App. Div., at pp. 341-342.

In Greater New York especially, with its 356 theatres, halls and stadiums, public interest in the theatre is unusually important.†

37 Harvard L. R., at p. 1127.

2. Historically considered, theatres may be regarded as "affected with a public interest."

A. E. Haigh, in *The Attic Theatre* [3rd Ed.], at p. 4, says:

"To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have thought it unwise to abandon to private venturers an institution which possessed the educational value and wide popularity of the drama."

At p. 330, it is said:

"Until the close of the fifth century every man had to pay for his place, although the charge was a small one. But the poorer classes began to complain that the expense was too great for them, and that the rich citizens bought up all the seats. Accordingly, a measure was framed directing that every citizen who cared to apply should have the price of the entrance paid to him by the state. The sum given in this way was called 'theoric money.' It used formerly to be supposed, on the strength of statements

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† Marks states that, in two of the five Boroughs of the City of New York (in the Boroughs of Manhattan and Brooklyn alone), there are at least 108 first-class theatres and 598 moving picture theatres (p. 24).

in Plutarch and Ulpian that this theoric system was introduced by Pericles. But the recently discovered Constitution of Athens has now shown that it was of much later date."

See also:

Donaldson, Theatre of the Greeks, at pp. 309-310.

15 Amer. Cyc., pp. 685-686.

In Rome, theatres were regulated by law. "The seats were allocated by the state and the care of the building committed to certain magistrates."

26 Ency. Brit. [11th Ed.], p. 736.

The operation of a theatre was a proper municipal purpose. "Municipalities were encouraged to build theatres."

26 Encyc. Brit., p. 736.

In England, theatre licensing dates back to Henry VIII.

Wandell, Law of the Theatre, at p. 3.

And in the United States, theatres have been subject to governmental regulation from earliest times.

*Opinion of Justices, supra.*

*People ex rel. Cort Theatre Co. v. Thompson, supra.*

*Cecil v. Green*, 161 Ill. 265; 43 N. E. 1105

Indeed, the theatre was not favored in colonial and early provincial Massachusetts. They were, at first, strictly forbidden. Licensing began in 1805.

*Opinion of Justices, supra.*

The modern trend is shown by the following excerpt from Ruling Case Law (Vol. 19, p. 722):

“The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. Thus, the appropriation of money for public concerts has been held to be proper. So, too, the erection of an auditorium has been regarded as properly falling within the purposes for which a municipal corporation may provide. Generally speaking anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes, and on this ground it has even been held that authority to erect and conduct an opera house may be conferred upon a municipal corporation.”

See also:

*Egan v. San Francisco*, 165 Cal. 576; 133 Pac. 294, 295, 296;

*Los Angeles v. Dodge*, 197 Pac. [Cal.], 403, 406, 407.

*Schieffelin v. Hylan*, 236 N. Y. 254, 265, 266.

3. In *People ex rel. Cort Theatre Co. v. Thompson* (*supra*), the Court said:

“The business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses, or other shows and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically

from accommodations offered by a merchant or professional man, who, while he invites everyone to enter, does so only for the purpose of selling to each individual services or merchandise."

In *Opinion of Justices (supra)*, it is said:

"The right to set up and maintain theatres and other places of public amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling cannot be subjected to a license fee or excise. These plainly are not affected with a public interest. *Gleason v. McKay*, 134 Mass. 419, 425. *O'Keefe v. Somerville*, 190 Mass. 110, 112, 113. *Chas. Wolff Packing Co. v. Industrial Court*, 262 U. S. 522. Theatres and places of public amusement as to maintenance and operation are different in nature. \* \* \* Numerous reasons lead to the conclusion that the maintenance of theatres and other places of amusement is for the use of the public and affected with a public interest. The character of the performances presented has an intimate connection with the preservation and promotion of public morality. Some theatrical presentations are injurious and some are beneficial to public morals. Although their entertaining and recreative features are commonly more emphasized than any other, they also have or are susceptible of distinctly educative functions. Some are highly instructive and enlightening. Some inspire emotions of patriotism, philanthropy and good will. They have a tendency to gather at one time large numbers of people under a single roof and under comparatively crowded conditions. These factors have intimate relation to the health, safety and good order of the community. In these particulars such places require constant supervision and inspec-

tion in the interests of the public at large in order to prevent disaster by fire and accident, spread of disease and general and individual disorder and crime. The construction and maintenance of buildings devoted to such uses demand approval and oversight by public officers acting for the general welfare. \* \* \* In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theatres and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. *People v. King*, 110 N. Y. 418, 428. *Donnell v. State*, 48 Miss. 661, 680, 681. *Aaron v. Ward*, 203 N. Y. 351, 356. See *Civil Rights Cases*, 109 U. S. 3, 41, 42."

In the opinion below, it is said [R., 59-60]:

"That the business of catering to the entertainment and amusement of the public is affected with a public interest seems apparent. It has been so recognized from antiquity. \* \* \* As to modern times, the public nature of the business is hardly open to argument. That hundreds of thousands of people daily attend theatrical performances, athletic contests, musical recitals, and other forms of amusement and entertainment, is a matter of common knowledge. That an even greater number of the public follows, with keen interest, the displays of strength, skill and ability of various kinds which take place in college and professional stadiums, in theatres and other similar places of resort, is evidenced by the amount of space devoted by the public press to the news of such occurrences and events. None now denies the right of appropriate authorities to license places of public entertainment and to limit, within reason, the fire and building hazards to which the public may

there be subjected. Supervision and control may also be exercised over performances which offend the public sense of decency, and the legislature may prohibit owners of amusement places from enforcing discriminatory regulations with respect to persons who may seek admission thereto. *People v. King*, 110 N. Y. 418; *Aaron v. Ward*, 203 N. Y. 351, 356. By reason of these considerations, as well as others, of a similar nature, theatres, 'require more or less of governmental supervision and regulation.' *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 9. See also *Mutual Film Corporation vs. Ohio Industrial Commission*, 236 U. S. 230."

4. The evidence shows an intimate relationship between persons engaged in operating theatres and those engaged in reselling theatre tickets; the control by "a dozen or fifteen" brokers of approximately two million theatre seats a year, or at least half of the choicest tickets, and the existence of fraud, extortion, exorbitant rates and similar abuses in the business (*vid. Point I, supra*).

Now, as attending places of amusement constitutes one of the chief means of recreation of the inhabitants of the city, and as the business of reselling theatre tickets is closely connected with that of conducting places of public amusement, it naturally follows that, if the business of conducting a theatre is a business affected with a public interest, that of reselling theatre tickets is also so affected.

*Opinion of Justices, supra.*

*People v. Weller, supra.*

And assuming that the business may not, in its origin, have been affected with a public interest, yet because of

the abuses which have grown up in connection with it, it has become so affected.

In *German Alliance Ins. Co. v. Lewis* (*supra*, at p. 411), the language of the Court was:

“The cases need no explanatory or fortifying comment. They demonstrate that a business by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge ANDREWS in *People v. Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. ‘*The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.*’ ”

It may be said of this business as was said of the insurance business that, “having become ‘clothed with a public interest,’ ” it is “subject ‘to be controlled by the public for the common good’ ” (*German Alliance Ins. Co. v. Lewis, supra*, at p. 415).

5. The Legislature of New York has solemnly “determined and declared”, by §167 of the statute under consideration, that:

“the price of a charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the

state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

Although "the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified" (*Wolff Packing Co. v. Industrial Court*, *supra*, at p. 536; *People v. Weller*, 237 N. Y., at p. 324); "yet the indication by the legislature of its own purposes may certainly, in some degree, guide the courts in their consideration of the validity of the legislative assertion of power" (*People v. Weller*, *supra*; and see *Block v. Hirsh*, 256 U. S. 135, 154; *Opinion of Justices*, *supra*).

### POINT III.

**The price-fixing provision is reasonable and appropriate to correct existing evils.**

Having established that the business of reselling theatre business is "affected with a public interest", and that any business so affected may be regulated, the question still remains whether price-fixing is reasonable and appropriate to correct the evils associated with that business.

We may say, at the very outset, that there is no dispute as to the constitutional principles governing the question involved. They are, as we have already remarked, simple and quite familiar. The difficulty is in the application of the principles.

1. As we have already pointed out, the general principle is that a State Legislature may, under its police power,

regulate prices and charges; that the extent to which regulation may reasonably go depends upon the nature of the business—whether it is “affected with a public interest”; the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like.

*Munn v. Illinois*, 94 U. S. 113.

*Budd v. New York*, 143 U. S. 517.

*Brass v. Stoeser*, 153 U. S. 391.

*German Alliance Inc. Co. v. Lewis*, 233 U. S. 389.

*Block v. Hirsh*, 256 U. S. 135.

*Marcus Brown Co. v. Feldman*, 256 U. S. 170.

*Wolff Packing Co. v. Industrial Court*, 262 U. S. 522.

We quote from some of the cases.

In the leading case *Munn v. Illinois* (*supra*), Chief Justice WAITE, speaking of “police powers,” said [pp. 125-126]:

“Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that

such legislation came within any of the constitutional prohibitions against interference with private property. \* \* \* From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that *when private property is 'affected with a public interest, it ceases to be juris privati only'*. This was said by Lord Chief Justice HALE more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78 and has been accepted without objection as an essential element in the law of property ever since. *Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.'*

At p. 134, the Court said:

"The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charges, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use."

In *Wolff Packing Co. v. Industrial Court* (*supra*), Chief Justice TAFT said [p. 535]:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills [citing cases].

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. *In the language of the cases, the owner by devoting his business to the pub-*

*lic use in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly"* [citing cases].

Cited under the third head (*supra*) are the familiar cases of:

*Munn v. Illinois, supra.*

*Spring Valley Water Works v. Schottler*, 110 U. S. 347.

*Budd v. New York, supra.*

*Brass v. Stoesser, supra.*

*Noble State Bank v. Haskell*, 219 U. S. 104.

*German Alliance Ins. Co. v. Lewis, supra.*

*Van Dyke v. Geary*, 244 U. S. 39.

*Block v. Hirsh, supra.*

Continuing, TAFT, C. J., said:

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest', as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. *The circumstances which clothe a particular kind of business with a public interest*, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public (at p. 538).

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. \* \* \* It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. \* \* \*

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. *It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.* To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation" (at pp. 538-539).

In *People v. Weller* (*supra*), the Court of Appeals said [pp. 321-322]:

“When the attempted exercise by the legislature of the power to regulate certain kinds of business and especially to fix prices was first challenged in the courts, the courts laid down the general rule that the power to regulate and fix prices depends upon whether the business is so ‘clothed with a public interest’ as to justify reasonably the imposition of regulations calculated to remove abuses, or perhaps even to secure benefits, in regard to features which clearly affect the public. This general rule is now well recognized but the limits of its application are still somewhat shadowy and indefinite. \* \* \* Decisions of this and other courts since that time have merely tended by the process of inclusion and exclusion to indicate the nature of the ‘special conditions and circumstances’ which may bring a business within principles which justify legislative control and regulation, and these cases may be referred to profitably only in so far as the ‘special conditions and circumstances’ considered therein are analogous to the special conditions and circumstances under consideration by us” [pp. 321-322].

2. Price fixing is old. In England, it may be traced back to the statutes forbidding regating, engrossing and forestalling (*People v. Weller*, 237 N. Y., at p. 328). Through them, Parliament sought to preserve freedom of trade by prohibition of acts which tend to restriction of free competition between the traders themselves, and “to prevent any man or set of men from possessing the power to arbitrarily determine the price at which an article of common use shall be sold *because he who controls prices is*

*the master of the world*" (*People v. Weller, supra; State v. Duluth Board of Trade*, 107 Minn. 506, at p. 529).

According to *Munn v. Illinois*, "it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold" (at p. 125).

Since *Munn v. Illinois* (1876), this method of regulation has been familiar in all American courts, and many kinds of businesses carried on without special franchises or privileges have been treated as public in character, and declared subject to legislative control.

In *Ratcliff v. Stockyards Co.* (74 Kan. 1; 86 Pac. 150), the Court said [at p. 7]:

"Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. \* \* \* Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. \* \* \* Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theatres, wharves, markets, warehouses for the storage of grain and tobacco, common carriers, the collection and distribution of news, and

the business of supplying and distributing water and gas. Some of these rest upon considerations of health, or the safety or the convenience of the people, but all fall within the general grounds of public necessity and public welfare."

In *Opinion of Justices (supra)*, many instances are given of the establishment of prices by public authorities in connection with businesses affected with a public interest other than those of common carriers and those requiring use of the public ways. The Court points out that:

"Usury laws which fix the price for the use of money have been upheld when directly assailed. *Griffith v. Connecticut*, 218 U. S. 563; *Missouri Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351; *Holcombe v. Creamer*, 231 Mass. 99, 105. If these laws are to be upheld only in the light of the common law history of interest for the use of money, *Munn v. Illinois*, 94 U. S. 113, 153, 154; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 432, 433, we are of opinion that in view of the history of the theatre in this commonwealth it stands on the same footing. There are examples of more or less definite fixing of prices in connection with licensing to be found in our statutes. For example, return under certain conditions of a percentage of the fee collected by managers of intelligence offices, G. L. c. 140, §§43, 44; interest to be charged by pawnbrokers, G. L. c. 140, §72; interest to be charged on loans of less than \$1,000. G. L. c. 140, §90; interest to be charged on loans of \$300. or less, T. L. c. 140, §§96 and 100. The constitutionality of such statutes, when attacked has been sustained. It was held in *Dewey v. Richardson*, 206 Mass. 430, that St. 1908, c. 605, §1, limiting the rate of interest legally to be

charged on unsecured loans for less than \$200 was constitutional. Similar laws as to pawnbrokers have been upheld. *Commonwealth v. Danziger*, 176 Mass, 290. Regulation of rates for hackney carriages are permissible. *Commonwealth v. Page*, 155 Mass. 227; *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252. Rates of common carriers and other co-called public service corporations are subject to public regulations. *Donham v. Public Service Commission*, 232 Mass. 309. Under the Workmen's Compensation Act fees of attorneys are regulated, *Gritta's Case*, 241 Mass. 525, 135 N. E. 114; and also of physicians, *Panasuk's Case*, 217 Mass. 589; *Puxen's Case*, 226 Mass. 292."

In the opinion below, it is said that "the right of the public to resort to public places of entertainment without being subjected to imposition and oppression at the hands of a small group of persons who control a substantial portion of the limited seating capacity of such places of public entertainment, is as much entitled to protection and preservation as is its right to enjoy less essential advantages and conveniences which are admittedly subject to regulatory legislation." As illustrations, the following examples are given [R. 62-63]:

"For example, taxicab and omnibus fares have long been the subject of fixation by appropriate authorities. Yet, under conditions as we now know them, such fares affect only those who desire special facilities and conveniences in the way of transportation. Extortionate rates, if charged, would not deprive a substantial portion of the public of a means of travel to and from their places of residence and business. The ordinary facilities of transportation would still exist and be available to all upon equal

terms. If, in answer to this statement, it be said that the State's right of regulating public service utilities arising out of special circumstances, and has, as its basis, the grant of privilege conferred by the public, the reply will be that such is not the controlling principle. See *People v. Budd*, 171 N. Y. 1, 27. And, at no previous time did the Government possess greater power to recognize the interest in a particular business than it does today. *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 411. To a certain extent, the law is a progressive science, *Holden v. Hardy*, 169 U. S. 366, and as indicative of the fact, it is now held lawful for a state to regulate rates to be charged for insurance contracts, *German Alliance Ins. Co. v. Kansas*, *supra*; the hours of labor in mines and underground working, *Holden v. Hardy*, *supra*; the number of hours per day that women may work in laundries, *Muller v. Oregon*, 208 U. S. 412; the maximum rates to be charged for the loan of money, *Gri-fith v. Connecticut*, 218 U. S. 563; the making of assignments of wages for security of debts of less than \$200, *Mutual Loan Co. v. Martell*, 222 U. S. 225; the making and selling of bread, *Schmidinger v. Chicago*, 226 U. S. 577 contracts limiting liability for injuries in advance of the injury received. *C. B. & Q. R. R. v. McQuire*, 219 U. S. 549; and a State may also compel banks within its jurisdiction to contribute to a guaranteed fund to protect deposits. *Noble State Bank v. Haskell*, 219 U. S. 104. These cases mark the development of the principles enunciated in the grain elevator litigation, 94 U. S. 113, and plainly show that State regulation may properly be applied to any business as and when, by circumstances and its nature, it rises from private to public concern. That is exactly what has happened with respect to public exhibitions and performances that are intended to entertain and amuse the public."

And we may add that, in a recent case, a statute providing for the qualifications and regulating charges of newspapers for the publication of legal notices in cities of over 100,000 inhabitants was held not unconstitutional as interfering with the freedom of contract, "because it is a rate paid for a necessary service in the administration of justice which may be taxed as costs; and because the statute, properly construed, does not prevent a contract for a different rate" (*State ex rel. Sekyra v. Schmoll*, Mo. ; 282 S. W. 702, 706).

The illustrations given in the cases cited show that the doctrine of the *Munn* case has not only been adhered to, but has been expanded and advanced to meet conditions as they arose. This is also shown by PROF. BURDICK's able summary of the history of the cases in which the doctrine case was applied (Burdick, *Law of the American Constitution*, §272). Thus, after stating that common carriers and innkeepers, as survivors of the ancient common callings, are under a duty to serve the public reasonably within the scope of their business, and that a similar duty is, by the common law, put upon those who are the recipients of the franchises of eminent domain or of the use of streets or highways, he says [§272]:

"It is quite clear that reasonable rates and practices may be established for these businesses by legislation, for this is but defining existing duties for the protection of the public. However, the Supreme Court has gone further, and has held that a State Legislature may under the police power impose a duty to serve at reasonable rates upon business not previously under that duty. In *Munn v. Illinois* [94 U. S. 113] and *Budd v. New York* [143 U. S.

517] it was held with regard to grain elevators, that the use of and profits from property could be regulated when the business is of great importance to the public and monopolistic in tendency, so that the public are in danger of oppression. In the first case two, and in the second case three justices dissented on the ground that such regulation not being for the protection of health, safety or morals could only be imposed upon businesses exercising a public use, as distinguished from those exercising a use in which the public has an interest, that is, that a business could only be so regulated which a state might carry on, or which was invested with powers reserved to the state such as eminent domain. In *Brass v. North Dakota* [153 U. S. 391] monopolistic conditions were declared not to constitute a necessary basis of such police regulations; it is enough if the business in question is of great public importance. In this case four justices dissented on the ground that where no monopolistic tendency is shown the doctrine of the preceding cases did not apply, and the need of the public for protection was not apparent. Although the strong dissent in the *Brass* case left somewhat in doubt for a time the very broad doctrine of the majority, this doubt seems to have been set at rest by the case of *German Alliance Insurance Company v. Kansas* [233 U. S. 389] in which the doctrine of the *Brass* case was expressly approved and applied to the insurance business. These same principles were held by the New York Court of Appeals and the Supreme Court of the United States to apply to rented property, and to justify the New York legislature during the building shortage after the Great War, in restricting landlords in New York City to the receipts of a reasonable rental, irrespective of the rent agreed upon"

(citing *People ex rel. Durham v. LaFetra*, 230 N. Y. 429; *Marcus Brown Co. v. Feldman*, 256 U. S. 170).

PROF. BURDICK then concludes his summary of these cases by the observation [§272]:

“Though it is declared to be ‘fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat’,<sup>†</sup> we certainly have a very liberal view taken of what makes a business public in character, and we have the police power put in these cases upon a very broad foundation.”

3. In *Opinion of Justices (supra)*, the Court said that “theatres and other places of public amusement” “fall either in the class which can be carried on only by authority of a public grant with the correlative duty of rendering public service, or in that exceptional class recognized for historical reasons as impressed with a public interest, like money lenders, keepers of inns, cabs and grist mills”—in classes designated (1) and (2) in *Wolff Packing Co. v. Industrial Court (supra)*, at p. 535).

It seems to us that theatres and other places of public amusement and the allied business of reselling tickets to such places also fall within the class designated (3) in *Wolff Packing Co. v. Industrial Court (supra)*—within which class come the *Munn* and other cases (*supra*). That business, it seems to us, is so concerned with the amusement, recreation and education of the people that it can be likewise said, paraphrasing the language of the *Wolff* case, that

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<sup>†</sup> Citing *Producers' Transp. Co. v. R. R. Comm.*, 251 U. S. 228, 230; *People ex rel. Durham v. LaFetra*, 230 N. Y. 429, 442. (And see, *Frost v. R. R. Comm.*, U. S. ; 70 L. Ed. 683).

"the thing which (gives) the public interest (is) the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation" (*Wolff Packing Co. v. Industrial Court, supra*, at p. 538).

Thus in *People v. King* (110 N. Y. 418), the question involved was as to the constitutionality of a statute securing "equal enjoyment of any accommodation, facility or privilege furnished by inn-keepers or common carriers, or by owners, managers, or lessees of theatres or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations" (at pp. 420-421). The statute was upheld, largely upon the authority of *Munn v. Illinois* (*supra*), and the decision established the proposition that places of public amusement fall in the same category as those businesses referred to in the *Munn* case. The Court said [at pp. 427-428]:

"By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do. The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the Legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution. The statute in question assumes to regulate the conduct

of owners or managers of places of public resort in the respect mentioned. The principle stated by WAITE, Ch. J., in *Munn v. Illinois* (94 U. S. 113, which received the assent of the majority of the court, applies in this case. 'Where', says the chief justice, 'one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.' In the judgment of the Legislature the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement, and the quasi public use to which the owner of such a place devoted his property, gives the Legislature a right to interfere."

In *Aaron v. Ward* (203 N. Y. 351) the Court said [pp. 355-357]:

"In several of the reported cases the keeping of a theater is spoken of as a strictly private undertaking, and it is said that the owner of a theater is under no obligation to give entertainments at all. The latter proposition is true, but the business of maintaining a theater can not be said to be 'strictly' private. In *People v. King* (110 N. Y. 418) the question was as to the constitutionality of the Civil Rights Act of this state which made it a misdemeanor to deny equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theaters or other places of public resort or amusement regardless of race, creed or color, and gave the party aggrieved the right to recover a penalty of from fifty to five hundred dollars for the offense. The statute was upheld on the ground that under the doctrine of *Munn v. Illinois* (94 U. S. 113) theaters

and places of public amusement (the case before the court was that of a skating rink) *were affected with a public interest which justified legislative regulation and interfere* \* \* \* That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private."

In his dissenting opinion in the *Civil Rights Cases* (109 U. S. 3), MR. JUSTICE HARLAN quoted from *Munn v. Illinois*, and said [at p. 42]:

"The doctrines of *Munn v. Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large."

However, in *Opinion of Justices (supra)*, the Court said:

"In advising as to the constitutionality of the proposed statute we do not rely in this connection upon cases like *Munn v. Illinois*, 94 U. S. 113, and *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, which rest upon more extreme ground."

Be that as it may, it seems to us that whether the theatre business falls within the class of businesses designated in the *Wolff* case as class (1) or that designated as (2) or that designated as (3) is wholly immaterial, provided it comes within one of these classes, and is affected with a public interest. And that it is so affected and comes within one of those classes there can be no doubt.

4. Some of the earlier cases seem to hold that the right to fix reasonable rates to protect the public follows when a business is affected with a public interest (*Munn v. Illinois*, *supra*, at p. 134; *Block v. Hirsh*, *supra*, at p. 157; see, also, *People v. Weller*, 207 App. Div., at p. 350). "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied" (*Munn v. Illinois*, *supra*). "If the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulations has been settled since *Munn v. Illinois*" (*Block v. Hirsh*, *supra*).

The more recent cases in this Court lean towards the view that the fact that a business is affected with a public interest does not, of itself, justify every kind of regulation, including price-fixing (*Wolff Packing Co. v. Industrial Court*, *supra*, at pp. 538-539; *Dorchy v. Kansas*, 264 U. S. 286).

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. \* \* \* It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. \* \* \* The extent to which regulation may reasonably go varies with different kinds of business" (*Wolff Packing Co. v. Industrial Court*, *supra*).

The Court of Appeals in *People v. Weller* (*supra*), the Supreme Judicial Court of Massachusetts in *Opinion of Justices* (*supra*) and the Court below, applying the doctrine

of the *Wolff* and *Dorchy* cases (*supra*), concluded that the rate-fixing provision of the statute under consideration was constitutional.

In *Opinion of Justices* (*supra*), the Court said:

"The circumstance that a business is affected with a public interest does not make legally possible every legislative regulation. All such regulations must be reasonable in their nature, directed to the prevention of real evils and adapted to the accomplishment of their avowed purpose. Under the guise of protecting the general welfare there cannot be arbitrary interference with business or irrational or unnecessary restriction. When it becomes established that a business is subject to legislative regulation because affected with a public interest and devoted to a public use, incidental and accessory features reasonable in scope and fair in aim fall under the same rule."

In *People v. Weller* (*supra*), the Court of Appeals said:

"Yet, obviously, the mere fact that the public interest in preventing race discrimination between citizens, in places of public resort, or in the maintenance of good order in such places justifies legislative regulation, which will reasonably tend to serve the public interest in these respects, is by no means decisive of the question of whether abuses reasonably to be feared from unrestricted and unregulated resales of theatre tickets, so closely affect the public interest as to place the regulation of the business of reselling tickets within the legislative control, to the extent of permitting the legislature to limit the price which may be demanded or received upon such resale" (p. 323).

5. In the case at bar, price-fixing is justified because of the existence of a virtual monopoly, and the consequent evils of "extortion, exorbitant rates and similar abuses (*vid. Point I, supra*). And this primarily is due to the fact that the sale of all desirable tickets which are not back of the "fifteenth or sixteenth row" are controlled by "probably a dozen or fifteen" brokers or speculators.

At the very outset, we desire to point out the quite obvious fact that, when evils are admitted, great discretion should be allowed the legislature in devising remedies. If it has been demonstrated by experience that a remedy is not sufficient to check the evil, then certainly the legislature can, under the police power, adopt a new and more drastic remedy. It cannot be in such a case that the legislature is powerless.

This power to adopt new remedies when old remedies fail is illustrated by the legislation as to lotteries, carrying concealed weapons and regulating the sale of intoxicating liquors.

Thus, a statute that made it a crime for a person to have in his possession lottery tickets without regard to the person's knowledge of what the articles were, has been held to be within the police power and not to deprive the accused of liberty without due process of law (*Ford v. State*, 85 Md. 465; 37 Atl. 172). In the case just cited, the Court said:

"An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state."

Therefore, it would seem that the above drastic statute was upheld on the ground that other statutes had failed to prevent "the lottery business."

In *Noble State Bank v. Haskell* (219 U. S. 104, 110), a statute of Oklahoma compelling a state bank to contribute to a guarantee fund to protect deposits was held constitutional although there was "no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business." The Court seemed to hold that this remedy was appropriate to prevent the evils that the Oklahoma legislature anticipated from "free banking."

We have shown that there have been many attempts to regulate the theatre ticket business not only in this State but in other States (*vid. Point II, supra*), and that, in the City of New York, a private attempt was made by the proprietor of a theatre to protect his patrons from paying extortionate prices by a clause declaring the ticket void if resold on the sidewalk (*Collister v. Hayman*, 183 N. Y. 250).

And after the decision in *Collister v. Hayman* (*supra*), an ordinance was passed excluding ticket sellers from carrying on their business "on or in any street in the city."

Code of Ordinances of the City of New York,  
Chapter 3, Art. 1, §12.

See also:

New York Penal Law, §1534 (Added by L. 1921,  
Ch. 12).

Yet, as the evils associated with the business continued—and especially the charging of extortionate rates—the Legislature was under a duty to pass the present statute and fix a rate. Its inaction would have been a confession that it was "powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

*People ex rel. Durham v. La Fetra*, 230 N. Y.  
429, 443.

Under the circumstances, what remedy is more appropriate than a price restriction?

Does not such a legislative provision reasonably tend to prevent the evils suffered by the public?

*People v. Schweinler Press*, 214 N. Y. 395, 406.

Do not the "means adopted bear a reasonable relation to the end sought to be accomplished"?

*State v. Harper*, 148 Wis. 57; 196 N. W. 451.

Is there any doubt "that the means are reasonably necessary for the accomplishment of the purpose"?

*Lawton v. Steele*, 152 U. S. 133, 137.

*For this recognized evil has any one been able to suggest an effective remedy other than a restriction of the price?*

We submit that, under the circumstances disclosed by the record, the remedy is proper and reasonable.

6. It is well settled that the existence of a virtual monopoly gives the legislature power to regulate rates (*vid. cases cited at pp. 38, 41, supra*).

In *Spring Valley Water Works v. Schottler* (*supra*), the Court said [at p. 354]:

"That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*."

In *Budd v. New York* (*supra*), the Court said [at p. 537]:

“In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice BRADLEY, who was one of the justices who concurred in the opinion of the court in *Munn v. Illinois*, speaking of that case, said: ‘The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.’ Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice BRADLEY regarded as the principle of the decision in *Munn v. Illinois*.”

In *Ratcliff v. Stockyards Co.* (*supra*), the Court said that:

“The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression,” as in cases of monopoly and the like, are circumstances affecting property with a public interest.

The conditions in the case at bar are similar to those which led this Court to hold in *German Alliance Ins. Co. v. Lewis* (233 U. S. 389) that the business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. At pages 416-417, the Court said:

“We may venture to observe that the price of insurance is not fixed over the counters of companies by what Adam Smith calls the higgling of the market,

but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract'."

"Extortion, exorbitant rates and similar abuses" cannot be eliminated by competition. Unless the price can be controlled by legislation, the public must be left "to the mercy of speculators" (*Collister v. Hayman*, 183 N. Y. 250, 254; *People v. Weller*, 237 N. Y., at pp. 327, 328).

To quote the words of this Court in *Brazee v. Michigan* (241 U. S. 340, 343), relative to employment agencies:

"The general nature of the business is such that unless regulated many persons may be exposed to misfortune against which the legislature can properly protect them."

7. In the case at bar, the Court below held that a regulatory statute such as is involved herein "is wholly justified", when "such conditions exist" as are disclosed by the record "and the legislature realizes that a large portion of the public, unless willing to meet the extortionate and arbitrary demands of a small group of ticket speculators, will be deprived of the right to be entertained, amused and, occasionally, educated by public exhibitions, which should be open to all upon equal terms" (R., 61); and that "the right of the public to resort to public places of entertainment without being subjected to imposition and oppression at the hands of a small group of persons who control a substantial portion of the limited seating capacity of such

places of public entertainment, is as much entitled to protection and preservation as is its right to enjoy less essential advantages and conveniences which are admittedly subject to regulatory legislation" (R., 62).

The decision of the Court of Appeals in *People v. Weller* (*supra*) is based upon substantially the same grounds as the decision of the Court below—that is, that the price-fixing provision is valid "only if the real abuse which the legislature has found exists, or is reasonably to be feared, \* \* \* is the abuse of unreasonably high or 'exorbitant rates' charged for a quasi-public service" (at p. 326).

In this connection, we quote extensively from the learned opinion of the Court of Appeals.

Discussing Marks' testimony (quoted pp. 12-16, *supra*), the Court said (at p. 327):

"Under these circumstances it cannot be doubted that when ticket brokers or speculators are permitted to charge any price which they can obtain from a buyer upon the resale of tickets of admission, abuses are not only reasonably to be feared, but actually exist."

Continuing, the Court said [p. 329]:

"The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek remedy for conditions which, unless controlled, will leave the patrons of the theatre 'to the mercy of speculators.'"†

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† See *Collister v. Hayman* (183 N. Y. 250, at p. 254).

Speaking of "liberty of contract", the Court said [at pp. 328-329]:

"The liberty of the individual citizen to contract freely should be jealously guarded even from encroachments by the state, and where barter is free and demand creates supply perhaps economic laws and not the fiat of the state is the proper corrective of exorbitant prices; but where the liberty of the individual citizen to contract freely has been restricted by the circumstance that a man or group of men has obtained control of the supply of a commodity which the public desires or commonly uses, and this control is used to compel the individual to pay any price which may be demanded though that price be far beyond the price which would be fixed by free contract between consumer and producer, a legislative mandate which regulates the exercise of the compulsive force may in effect *restore* and *not diminish* the liberty of the individual."

Again, the Court said [328-329]:

"The power of the legislature in a proper case to 'promote the public welfare' by regulating or restricting acts which interfere with free negotiation between the consumers and producers of a commodity in common use and impede the operation of the laws of supply and demand should not be doubted (see opinion of Chief Justice WHITE in *Standard Oil Co. v. United States*, 221 U. S. at pages 50 to 58), and we see no distinction in principle between commodities and privileges or licenses, such as tickets of admission, if there exists a general public demand for them and they are in common use."

Upon the assumption that it might be "impossible", if not "unwise", "to attempt to define in general terms the circumstances which may justify legislative intervention or the degree of regulation which is reasonable" (at p. 329), the Court said [at p. 329]:

"But in the present case the fact that the business of conducting places of public amusement has always been regarded as affected with a public interest, at least to the extent that it is 'competent for the State to impose the condition that the proprietor shall admit or accommodate all persons impartially' (*Cooley on Torts* [2d ed.], 336); the evidence that the ticket brokers or speculators at least in the City of New York, with or without the concurrence of the theatre managers, purchase in advance so many of the seats in the orchestra of all the theatres that the general public cannot purchase at the box office seats in the first fifteen rows and are compelled to purchase these seats, if at all, from the ticket brokers; and the fact that the public desire for admission to places of amusement is so great that exorbitant prices for tickets of admission far beyond those charged by the producers can be extorted from the general public by reason of this control of the supply by the brokers, in our opinion clearly justify reasonable restrictions by the legislature upon the business of reselling such tickets."

The Court then added [at p. 329]:

*"The legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which, at least in part, are not desired*

*by the public, especially where such acts occur in a business which is measurably affected with a public interest.'*

Then, assuming the interest of the public in the business of conducting places of amusement might not, in itself, be sufficient to justify regulation of price, the Court said that "a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of control of the supply should not be condemned merely because the legislature has seen fit to use price regulations as the instrument which may accomplish the desired purpose" (at pp. 330-331), and added [at p. 331]:

"Even though the ultimate purpose of statutes which regulate prices may be the protection of the public from excessive charge, alike where the price regulation is directed against the abuse of extortion through control of supply, by one who does not produce the supply, and where the price regulation is directed against the alleged abuse of unreasonably high prices secured by a producer through negotiation; yet in the one case the statute restricts the freedom of the individual in the performance of acts which are of such benefit to the public that even the price to be charged for them is a matter of public concern. The special conditions and circumstances in the one case may bring a business within principles which by the common law and practice of free governments justify legislative control and regulation though such control might not be justified merely by the public character of the business."

Concluding, the Court said [at pp. 331-332]:

"The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest. The legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the legislature the responsibility of determining whether the remedy is wise and will promote the public welfare. The courts are called upon to determine only whether the legislature has acted within its powers in enacting this legislation; the judges have no disposition, and the courts have no right, to pass upon the wisdom of its exercise."

8. The remaining question is the reasonableness of the regulation.

It should be borne in mind that the statute does not, in any way, prohibit the business of reselling theatre tickets; it merely seeks to regulate it—to restrict the price which brokers may charge for their services to what seems a fair and adequate compensation, and in this manner, to prevent the admitted evils and abuses associated with the business. Under the circumstances disclosed by the record, we submit that the regulation is eminently proper.

In *People v. Weller* (*supra*), the Court of Appeals said [at p. 330]:

“The sole question which we must still consider is whether the regulation of the legislature is reasonable. The statute does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above.† It permits the brokers to charge an advance of fifty cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale. It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy.”

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† The statutes involved in the cases referred to absolutely prohibited the resale of theatre tickets at enhanced prices. There is, of course, a distinction between an absolute prohibition and a price restriction. This distinction and the distinction between the cases referred to and the case at bar is pointed in our Point IV (*vid.* pp. 74-78, *infra*).

The Appellate Division said [*People v. Weller*, at pp. 348-349]:

“By the terms of the statute in question the ticket speculator is permitted to carry on his business and is permitted to make a reasonable profit. The act is, therefore, not confiscatory. It is not attacked upon the ground that it is confiscatory or that it prevents a fair profit. \* \* \* It is established on the record that the advance of fifty cents is the amount customarily taken by the speculator for himself, over the price he pays for the ticket. In the business itself it is established that this is a reasonable charge for the service rendered by him so that it was shown in this case that the statute does not tend to have a confiscatory effect. \* \* \* It is true that the testimony is that on a resale of a theatre ticket bought from another agency the speculator still adds fifty cents for his services. This does not make it unreasonable to limit the speculator who handles the tickets to a service charge of fifty cents per ticket; for were it to be justified, the process of re-handling the tickets and adding additional charges could go on indefinitely, to the defeat of all regulation of this kind.”

And, at p. 353, the Appellate Division said:

“The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that any one who wishes to carry on the business of reselling tickets must do so after he obtains a license, and

that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets. This act regulates the charges of the speculator or broker. It prohibits those who have a monopoly of the tickets, made possible by arrangements with the theatres, from charging extortionate fees for 'service' in securing and selling tickets."

9. Not only is the price-fixing regulation reasonable, but the rate fixed is fair and reasonable. This is shown not only by the affidavits of McBride and McNamee, submitted in answer to Marks' affidavit (R. 54-55, 56; and *vid.* pp. 8-9, *supra*), but also by Marks' testimony in the case of *People v. Weller* (to which we have already referred) to the effect that he and his partners "made a comfortable living" (R. 44; and *vid.* pp. 15-16, *supra*).

It is settled that the fixing of a rate is a legislative function and, as applied to those carrying on a business that is affected with a public interest, will be upheld if it is reasonable.

*Chicago &c. Ry. Co. v. Wellman*, 143 U. S. 339, 344.

*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 398.

*Ratcliff v. Stockyards Co.*, 74 Kans. 1; 86 Pac. 150, 154.

Assuming that the Court can in this action inquire into the question whether the above excess price provision is reasonable, the price established by the legislature is "at

least *prima facie* evidence of what is reasonable and just" (*Reagan v. Farmers L. & T. Co.*, *supra*, at p. 395).

It is true that Marks also testified that the ticket sellers who did not have a large business had to charge an excess of more than 50 cents on a ticket to "exist" (R. 43). But it does not follow because some persons who have invested their money in the business of ticket selling can not carry on their business at a profit unless they charge an excess price of more than 50 cents on a ticket, that the rate established by the statute is unfair and unreasonable. Their methods of carrying on business may be unwise. They may have been extravagant.

*Reagan v. Farmers' L. & T. Co.*, *supra*.

*Ratcliff v. Stockyards Co.*, *supra*.

In *State v. Hall* (175 Wis. 172; 190 N. W. 457, 438), it is stated:

"The constitutionality of laws does not depend upon such fortuitous circumstances. It is well established principle of law that the constitutionality of an act cannot be tested by the evidence in the particular case."

See also:

*St. Louis v. Liessing*, 190 Mo. 464; 89 S. W. 611, 613, 614.

10. The decisions dealing with the constitutionality of statutes regulating the price of admission to theatres have been commented upon by the leading law reviews.

Speaking of the decisions in the *Quarg*, *Steele*, *Powers* and *Newman* cases (*vid. pp. 22-25, supra*), the Minnesota Law Review said [Vol. 5, pp. 70-71]:

"The uniform hostility of the courts towards the constitutionality of measures adapted to eradicate the evil of scalping theatre tickets, renders the outlook somewhat pessimistic. Without such laws, this method of preying on the public can only be hedged in with restrictions, but cannot be satisfactorily stamped out. \* \* \* But there is apparent a marked tendency to take the theatrical business out of the class of private businesses. The rapid and enormous spread of theatres, particularly of moving-picture houses, with the resulting Governmental interferences along the line of licenses and boards of censorships, and the increasingly large number of the public reached by this form of amusement, give promise that the theatre may soon be regarded in a new light, as a business affected with a public interest, such that it is a fit subject for police regulation. \* \* \* The trend of these signs is unmistakable, and the anti-scalping statutes under consideration, though they are unconstitutional today, may in the future be upheld as valid, when the modern theatre business receives its correct classification as a public business and a proper subject for police regulation, along with railroads and other public industries."

Concerning the *Dees* case (*vid.* p. 24, *supra*), the California Law Review said [Vol. 8, pp. 433-434]:

"There is, at least, some ground for faith in (the) competency (of the police power) to deal with ticket scalpers, the ticket brokerage business. And, it is submitted, the principal case, upon careful examination, will disclose nothing in contravention of the proposition that it can. \* \* \* The ticket brokerage business may be so conducted as to be a legitimate business; one conducing to public convenience as an

agency of distribution. In this character, it can claim protection of the rule forbidding prohibition of a business not inherently objectionable, or regulation unreasonably discriminating against individuals engaged therein. \* \* \* Public comfort and convenience would assuredly be served by the elimination of certain of the petty pirates of the by-ways, and the alleviation of the necessity for rendering them further tribute."

Of the Appellate Division opinion in the *Weller* case, the Yale Law Journal said [Vol. 33, p. 434]:

"The court in the instant case pointed out that the control of admission tickets to theatres is largely in the hands of a comparatively small number of brokers. In view of the *Brass* case [153 U. S. 391], this is probably not an essential condition to State regulation. Prior price regulation cases have largely involved businesses affecting trade and commerce. But to extend their principle to cover speculation in tickets involves no straining of the police power. The theatre has become a vital and entirely commercialized portion of our national life."

Speaking of the same opinion, the Columbia Law Review said [Vol. 24, pp. 203-204]:

"The fixing of the rate, although generally confined to public utilities, may be extended to a business merely of a public nature, if the particular abuse requires a remedy of such a nature. That this decision is a step forward towards the view that the theatre and its connected enterprises may some day be considered a public utility is an inference which may be properly drawn. That the statute makes an effort to remedy an abuse is undoubted, and the instant case, although without direct precedent, is

illustrative of the efforts of courts to uphold legislation in matters involving a public interest."

As for the Court of Appeals opinion in the *Weller* case, the Cornell Law Quarterly said [Vol. 9, p. 324]:

"This present decision goes one step farther than those which preceded it, since it holds that places conducted for the amusement of their patrons may be clothed with a public interest, so that the imposition upon them of public service duties, such as serving at reasonable prices, is due process. The conclusion of the court in this case was a reasonable, foreseeable step in the modern development of the conception of the police power."

The Harvard Law Review commented as follows on the opinion in question [Vol. 37, p. 1128]:

"A statute which leaves the managers free to fix the basic price, which permits a fair profit upon the broker's resale, and which only prevents the admitted evil of extortion due to speculation, would seem to be entirely reasonable."

The article concludes [pp. 1128-29]:

"The very approach of the court from the facts in this case, however, is a warning against indiscriminate copying of the statute in question. The constitutionality of such a particular regulation depends upon external conditions in time and place. Such is the doctrine laid down by the Supreme Court in an analogous problem, in the leading federal case of *Clark v. Nash* [198 U. S. 361], in which the Court upheld a Utah statute permitting individual condemnation of land for irrigation purposes, while admitting that the purpose would have been

private and the act unconstitutional in most of the states. An emergency war period may make constitutional a stringent restriction upon the right of a landlord to evict his tenants [*Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Co. v. Feldman*, 256 U. S. 170]. Particular conditions justify the Supreme Court in upholding the validity of a New York statute limiting a landlord's recovery to a reasonable rental [*Levy Leasing Co. v. Siegel*, 258 U. S. 242], or in sustaining a North Dakota law declaring that hail insurance be effective twenty-four hours after the filing of the application, while requiring the company to telegraph any refusal to insure [*National Fire Ins. Co. v. Wanberg*, 260 U. S. 71]. Innumerable other cases demonstrate this same thesis; interferences with the conduct of businesses are harmonized with the due process clause by the social necessities of the local communities. Interchange the communities and the results might be quite different."

Comment on these articles is unnecessary, except, perhaps, to add that Chief Judge HISCOCK, who concurred in the opinion of the Court of Appeals in *People v. Weller* (*supra*), voiced the same thought as the learned writer of the Article in the Harvard Law Review (just quoted), in an address before the Association of the Bar of the City of New York. He said:

"The most recent decision of the Court upholding police regulation was the one giving the stamp of approval to the statute regulating the business of brokers engaged in selling theatre tickets and for which there was great demand in New York City. That decision is liable to be misunderstood unless considered with some care. It did not uphold the

statute in question as a statute fixing the price of theatre tickets, but on the ground that the sale of tickets by brokers intimately connected with theatres, which have long been held to be subject to regulation, was so controlled and conducted that it was liable to be productive of fraud and extortion in the purchase of tickets, and that therefore it might be properly regulated" (N. Y. Law Journal, Sept. 6, 1924).

11. An interesting question, in no way involved upon this appeal, but one which might suggest itself, is whether the price of admission to theatres may be regulated. The present statute does not attempt to fix the price which may be charged by the theatre, but merely requires the proprietor to "print on the face of each such ticket or other evidence of the right of entry, the price charged therefor" by him. The question may be said to have been indirectly involved in the case of *People ex rel. Cort Theatre Co. v. Thompson* (*supra*) (*vid. pp. 23-24, supra*). Speaking of the purpose of ordinance involved in that case, the Court said:

"The question here is whether the Constitution protects a theatre owner in a scheme by which an applicant for a ticket is told that the house is sold out, and upon going to the ticket scalper is permitted to select the part of the house where he desires to sit and the ticket scalper turns to the telephone and directs the theatre to send up a ticket, which is sent and sold at an advanced price."

Fundamentally, the same question is involved in the present case.

If evil were found to exist to correct which the ordinance involved in the *Thompson* case (*supra*) was passed,

and if it should ever become necessary to safeguard the public against "fraud, extortion, extortionate rates and similar abuses," especially if there should ever be a monopoly in the business, we believe that the interest of the public in gaining admission to theatres in particular, and the corresponding interest, if not duty, of the State to provide for the amusement, education and instruction of the public, would justify it in compelling theatre owners, as a condition precedent to the granting of licenses, to restrict the price of tickets to a fair and reasonable return upon their investment.

In conclusion of this point, we submit that the price-fixing provision is a reasonable and appropriate remedy to correct the evils and abuses existing in the business of reselling theatre tickets, and that, as the business is affected with a public interest, the provision is valid and constitutional.

## POINT IV.

### **Answering appellant's contentions.**

We now answer the contentions made by plaintiff-appellant.

1. Counsel cites the cases of *Ex parte Quarg* (149 Cal. 79; 84 Pac. 766); *People v. Steele* (231 Ill. 340; 83 N. E. 236); *City of Chicago v. Powers* (231 Ill. 560; 83 N. E. 240), as denying the existence of power in the legislature to fix the price of theatre tickets (Brief, p. 32).

We have already referred to these cases (*vid.* Point III, *supra*). It will be observed that the statutes therein in-

volved contained no price-restriction feature such as the statute now under consideration. They either (1) prohibited the business altogether, or (2) prohibited the exacting of any additional charge. That is, of course, an altogether different proposition from prescribing a reasonable charge for the service.

*People ex rel. Cort Theatre Co. v. Thompson,*  
*supra.*

*People v. Weller, supra.*

*Opinion of Justices, supra.*

In *People ex rel. Cort Theatre Co. v. Thompson (supra)*, the Court said:

It is contended from first to last that that question was decided in the consolidated cases of *People v. Steele* and *People v. Altschul*, 231 Ill. 340, and the four cases decided in *City of Chicago v. Powers*, 231 Ill. 560, and that the doctrine of *stare decisis* requires the court to affirm the judgment of the superior court. This is a total misapprehension of the questions decided in either of those cases. \* \* \* There was no question related to the one here involved in either of those cases, and the only similarity is that the suits concerned theater owners and ticket brokers or scalpers, and it is only by contending that this ordinance is designed to break up the legitimate business of ticket brokers that any resemblance is found. \* \* \* The decision in those cases were in accordance with the weight of authority that the constitutional liberty of the ticket broker is violated when he is prohibited altogether from carrying on his business. *Tiedemann on Limitation of Police Power*, 293. They were, in effect, the same as the decision of the Supreme Court of the United States in *Adams v. Tanner*, 244

U. S. 590, in which it was held that the statute making it a criminal offense to collect fees from workers for furnishing them with employment was a violation of constitutional rights, because it was not a proper regulation of employment agencies for the public welfare, but was destructive of the lawful and useful calling even if it was carried on in an upright way. \* \* \* In every case the right of regulation has been recognized, but the power to destroy a legitimate business, which was attempted by the statute and ordinance held void in the *Steele* and *Powers* cases, has been denied.

In *Opinion of Justices (supra)*, the Court said:

“Manifestly no statute by attempting to outlaw a natural right can deprive one of the opportunity to earn his livelihood. The rights to labor and to do ordinary business are natural, essential and inalienable, partaking of the nature both of personal liberty and of private property [citing *Adams v. Tanner*, 244 U. S. 590, and other cases]. It was held in *People v. Steele*, 231 Ill. 340, and *Ex Parte Quarg*, 149 Cal. 79, that a prohibition of the resale of such tickets at an advance over the price printed on the face of the tickets was unconstitutional because it made criminal the doing of a reasonable kind of business.”

In *People v. Weller (supra)*, the Court of Appeals said:

“All these decisions are to some extent based upon the view that in effect the purpose of the statute was to fix prices. (See dissenting opinion in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, at page 431.) In all these cases the reasoning of the court seems to rest upon two premises: First, that

the business of conducting a place of amusement is essentially a private business and the legislature has no more power to fix the prices that may be demanded or received in that business than it would have to regulate the price that may be demanded or received by a tailor, an artisan or a merchant upon the sale of services or commodities. Second, that the business of reselling tickets of admission is a lawful business performing a useful service and that any person carrying on such business should be left free to contract for the performance of such service with any person who desires to avail himself of the service afforded by such business" (at pp. 324-325).

And, at p. 330, the Court said:

"The statute (here involved) does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above."

The Appellate Division said [*People v. Weller, supra*, p. 353]:

"Reliance was placed by the defendant in the court below on three cases and it is said that they are decisive of the case now before the court. An examination of the authorities relied upon shows that they are not in point. One case arose in California. In that case (*Ex parte Quarg*, 149 Cal. 79) the court was passing upon a statute which provided that it was a misdemeanor to sell or offer to sell a theatre ticket at a price in excess of that ordinarily charged by the management. That statute absolutely pro-

hibited, by indirection, the business of ticket broker or speculator, and prohibited any one who bought a ticket from reselling it at any price beyond that which the theatre charge, allowing no compensation whatever for the service rendered in furnishing the ticket. The other cases relied upon, namely, *People v. Steele* (231 Ill. 340) and *City of Chicago v. Powers* (*Id.* 560) arose in Illinois. These were very much limited by a subsequent decision of the same court (*People ex rel. Cort Theatre Co. v. Thompson, supra*). This latter case clearly points out the distinction between the *Steele* case, the *Powers* case and the case now before the court. In the *Steele* case, like the *Quarg* case in *California*, the ordinance prohibited the sale of tickets for more than the price printed thereon. In the *Powers* case the ordinance did likewise."

As for the case of *People v. Newman* (109 N. Y. Misc. 322), which nullified an ordinance substantially similar to the statute now under consideration, it suffices to say that the Court there considered the *Quarg*, *Steele* and *Powers* cases "decisive" of the question involved (see *People v. Veller*, 207 App. Div. at p. 353), and the *Thompson* case inapplicable (109 Misc., at pp. 635, 636); it overlooked the distinction between absolute prohibition and price restriction. And for this reason the ruling, so far as the constitutional question is concerned, was very properly rejected on appeal (*People v. Newman*, 207 N. Y. App. Div. 354; and *vid.* p. 5, *supra*).

Furthermore, the testimony in the *Quarg*, *Steele* and *Powers* cases distinguishes those cases from the case at bar. Thus, in the leading *Quarg* case (*supra*), the Court held that

“the sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit.”

Continuing, the Court said:

“It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. *It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just so far as he is concerned.*”

But the testimony of Marks, to which we have already referred, shows that, as to the choice seats, the “second buyer” would not “have had the same opportunity as the first buyer to purchase a similar ticket.” He could not have obtained such a ticket even if he had exercised the greatest “diligence and effort.” The best the “second buyer” could have obtained “for any show” would have been “the fifteenth or sixteenth row.” Certainly, it cannot be truly said that “the transaction is just so far as he is concerned.”

Furthermore, having this control, these men fix whatever prices they desire for these seats. The price is not fixed “over the counters”, “by what Adam Smith calls

the higgling of the market" (see *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 416).

It is true that individuals are not forced to buy from these brokers, "but they are making their choice between paying the higher price and not witnessing the performance to which the public are invited" (see *People ex rel. Cort Theatre Co. v. Thompson, supra*).

3. Counsel relies upon the decision in *Adkins v. Children's Hospital* (261 U. S. 525), as to the Minimum Wage Act (Brief, p. 24). That case, it is submitted, is plainly distinguishable. The question there involved, as stated by the Court, was [at p. 539]:

"The question presented for determination by these appeals is the constitutionality of the act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia."

It is apparent from the following excerpts of the majority opinion that the question did not arise as to the reasonableness of a rate fixed by the Legislature as to a business affected with a public interest. The Court said [at p. 546]:

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been

upheld and consider the grounds upon which they rest:

*"1. Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.*

*"There are many cases, but it is sufficient to cite Munn v. Illinois, 94 U. S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use, which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld and, it may be noted in passing, so upheld even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. \* \* \* In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable."*

The Court further stated [at p. 554]:

*"If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult*

*women* (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.”

It will be observed that the minimum wage law did not deal “with any business charged with a public interest.” It was not confined to kinds of business where it is recognized that it is proper under the police power to impose a license as a condition to engage in the business. There was no evidence that there was a monopoly warranting regulation by law. It was not, so the Court says, “for the prevention of fraud.” In all these important particulars it differed from the case at bar.

In *Radice v. New York* (264 U. S. 292), the Court referred to *Adkins* case (*supra*) as follows [at p. 295]:

“The statute in the *Adkins* Case was a wage-fixing law pure and simple. It had nothing to do with the hours or conditions of labor. We held that it exacted from the employer ‘an arbitrary payment for a purpose and upon a basis having no casual connection with his business, or the contract or the work’ of the employee \* \* \*.”

4. Counsel also relies on *Wolff Packing Co. v. Industrial Court* (262 U. S. 522), in which the validity of the Court of Industrial Relations Act of Kansas was con-

sidered (Brief, p. 45). The case is also distinguishable from the case at bar. The conclusion of the Court, as announced by the CHIEF JUSTICE was as follows [at p. 544]:

“We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error’s packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law.”

The Court then divided businesses affected with a public interest into three classes, and in the third class placed those “businesses which though not public at their inception may be fairly said to have risen to be such” (at p. 535); such business, for example, as storing and elevating grain (*Munn v. Illinois, supra*), fire insurance (*German Alliance Ins. Co. v. Lewis, supra*), &c. Continuing, the Court said [at p. 538]:

“In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. *But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of*

*rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before."*

Attention in particular is called to the statement of the Court that "there is no monopoly in the preparation of foods," and the concession that prices are "fixed by competition throughout the country at large." It does not appear that the statute involved in the *Wolff* case was to correct abuses—to protect the public from "exorbitant charges and arbitrary control," (see p. 538); nor to prevent fraud.

On the other hand, as we have already argued, the business of conducting a theatre comes squarely within one of the three classes of businesses affected with a public interest, according to the classification in the *Wolff* case (*supra*).

Furthermore, as the Court below pointed out [R. 59], the *Wolff* case (*supra*) "aside from the decision upon the facts then before the court, is authority for little else than that the extent to which legislation may regulate the conduct of a business affected by a public interest depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared."

5. Counsel contends that *Block v. Hirsh* (256 U. S. 135) and other similar cases relied upon by us "proceed upon an entirely different principle, namely, that an emergency existed which made it necessary for the state to interfere temporarily, and not permanently in the interest of public health" (Brief, p. 45).

But in one of these cases (*People ex rel. Durham v. Fetra*, 230 N. Y. 429), the Court expressly held that such

regulatory power was not confined to "an emergency". The Court said [at p. 445]:

"Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. (*Lincoln Trust Co. v. Williams Blg. Corp.*, 229 N. Y. 313; *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U. S. 269). Laws restricting the use of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action (*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoeser*, 153 U. S. 391; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; *Oklahoma Operating Co. v. Love*, 252 U. S. 331; *Holter Hardware Co. v. Boyle*, 263 Fed. Rep. 134; *American Coal Min. Co. v. Special C. & F. Comm.*, *supra* [268 Fed. Rep. 563, 565]). The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling. (*Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355.)"

In enacting the present statute the Legislature was dealing with the abuses of a system of long standing. A system that directly affected the welfare of the people as to their amusement, recreation and education. If the Legislature can act in an emergency, why not act when there is a chronic case?

6. Counsel contends that the legislature has no more right to regulate the price at which tickets can be sold than it would have a right to regulate the prices of products of the soil and the industry of artisans (Brief, p. 19).

It is submitted that, if there were a monopoly in these products created by middlemen who made exorbitant profits, the legislature would undoubtedly have the power to protect the people by curbing the greed of the profiteers as it has attempted to do in passing the present statute.

Counsel asks whether it would be within the purview of the legislative power to fix the prices which jewelers could charge, such prices being "based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberley." Again, he asks as to the validity of a regulation whereby vendors of rugs were limited "to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings was prohibited from disposing of them at a price exceeding to the extent of \$100 that paid to the artist" (Brief, p. 22).

But these illustrations in respect to jewellers, dealers in rugs and oil paintings are in regard to luxuries and have no application to the present statute which deals with a necessity, which aims to secure amusement, recreation and education for the poor as well as the rich.

However, it is submitted that if dealers in rugs or precious stones carried on their business in such a way as to impose upon and deceive their customers, the legislature would have a right to regulate the business (see N. Y. Penal Law, §§422-431).

In a recent case in Maryland (*Mogul v. Gaither*, 142 Md. 380; 121 Atl. 32), an ordinance of Baltimore City prohibiting auction sales of jewelry, except in certain cases, was held constitutional within the Constitution of the United States, 14th Amendment, §1.

7. Counsel adds (Brief, p. 22):

“The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera.”

We submit that, in claiming the similarity between luxuries and “tickets of admission to the theatre or the opera”, counsel in effect concedes our contention that, by “extortion” and “exorbitant rates”, the theatre ticket brokers have made a *luxury* of that which in its nature is a *necessity*.

The lessening of the hours of labor owing to the influence of this mechanical age, it seems to us, has made the theatre a necessity. In the language of the Court in *State v. Harper* (148 Wis. 57; 196 N. W. 451, 455), “the luxuries of one decade become the necessities of another.” Thus becoming necessities, the Legislature had an undoubted right to intervene.

Assuming the business affected has no connection with the manufacture or sale of luxuries, conceding that it is an ordinary manufacturing or trading business or the busi-

ness of the professional man; yet the cases recognize that there is a great difference between such businesses as to the power of the State to regulate and the business of operating a place of public amusement.

In *Jones v. Broadway Roller Rink Co.* (136 Wis. 595; 118 N. W. 170, 172), the Court said:

“Public accommodation and amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites everyone to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has been often noted.”

In *People ex rel. Cort Theatre Co. v. Thompson* (*supra*), the Court said:

“The business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses, or other shows, and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites every one to enter, does so only for the purpose of selling to each individual services or merchandise. *Jones v. Roller Skating Rink*, 136 Wis. 595, 118 N. W. 170).”

In *Opinion of Justices (supra)*, it is said:

“The right to set up and maintain theatres and other places of public amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling cannot be subjected to a license fee or excise. These plainly are not affected with a public interest. *Gleason v. McKay*, 134 Mass. 419, 425. *O’Keeffe v. Somerville*, 190 Mass. 110, 112, 113. *Chas. Wolff Packing Co. v. Industrial Court*, 262 U. S. 522. Theatres and places of public amusement as to maintenance and operation are different in nature.

See also:

*Goff v. Savage*, 122 Wash. 194; 210 Pac. 374, 375.  
*Brown v. J. H. Bell & Co.*, 146 Ia. 89; 123 N. W. 231, 235.

### In Conclusion.

To hold that the statute involved is unconstitutional is to admit that, however injurious the abuses of the business of ticket selling and however righteous may be the indignation of the public at these abuses, the police power of the State cannot deal with the evil.

The evil is not new. As already indicated, abuses similar to those described in the case at bar existed in ancient Athens and Rome (*vid. pp. 30-31, supra*). Over two thousand years thereafter a like situation exists in this State. Is there no remedy? Is the Legislature so powerless that it cannot safeguard “the public against fraud, extortion, exorbitant rates and similar abuses”?

As the Court of Appeals said in *People ex rel. Durham v. La Fetra* (230 N. Y. 429, 443):

“Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.”

**The decree should be affirmed.**

Respectfully submitted,

FELIX C. BENVENGA,

Solicitor for Appellee, Joab H. Banton,  
District Attorney of the County of  
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Of counsel.

August, 1926.



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To be Argued by  
ROBERT P. BEYER.

IN THE

# Supreme Court of the United States

1926  
OCTOBER TERM, ~~1925~~.  
No. ~~879~~. 261.

TYSON AND BROTHER—UNITED THEATRE  
TICKET OFFICES, INC., Appellant,

vs.

JOAB H. BANTON, as District Attorney of the County of  
New York, and VINCENT B. MURPHY, as  
Comptroller of the State of New York,  
Appellees.

BRIEF OF APPELLEE, VINCENT B. MURPHY  
AS COMPTROLLER OF THE STATE  
OF NEW YORK.

ALBERT OTTINGER,  
*Attorney General of the State of New York.*

ROBERT P. BEYER,  
*Deputy Attorney General of Counsel.*



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Argued by  
ROBERT P. BEYER,  
Deputy Attorney General of the  
State of New York.

# Supreme Court of the United States

OCTOBER TERM, 1925. No. 870.

TYSON AND BROTHER—UNITED THEATRE  
TICKET OFFICES, INC.,

*Appellant,*

against

JOAB H. BANTON, as District Attorney of  
the County of New York, and VINCENT  
B. MURPHY, as Comptroller of the State  
of New York,

*Appellees.*

## BRIEF OF APPELLEE, VINCENT B. MURPHY AS COMPTROLLER OF THE STATE OF NEW YORK.

### Statement.

This case involves the Constitutionality of Article 10b of the General Business Law of the State of New York (added by Chapter 590 of the Laws of 1922), prohibiting the re-selling of theatre tickets without a license and regulating the conduct of the licensee.

It comes before this Court on an appeal from a decree from a statutory court, consisting of Hon. Henry Wade Rogers, Circuit Judge, and Hon. John C. Knox and Hon. Henry W. Goddard, District Judges, denying a motion for an injunction restraining the defendants from enforcing the provisions of said statute.

### **The Statute Involved.**

By Chapter 590 of the Laws of 1922, taking effect April 12th, 1922, the New York Legislature declared (Section 167 of the General Business Law) :

“It is hereby determined and declared that the price of or the charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.”

The Legislature thereupon enacted (Sec. 160 of the General Business Law) that all persons engaged in the resale of tickets of admission were required to receive a license from the Comptroller of the State of New York and were required (Section 169) to accompany the application for a license with a bond in due form to the People of the State of New York in the penal sum of One Thousand Dollars conditioned that the obligor will not be guilty of any fraud or extortion and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by Article 10b of the General Business Law of the State of New York of which the heretofore quoted sections formed a part.

Under Section 172 of the General Business Law, the Legislature provided that no licensee shall re-sell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of Fifty Cents in advance of the price printed on the face of such ticket or other evidence of the right of entry.

The general business of re-selling theatre tickets was placed under the supervision of the Comptroller of the State of New York (Sec. 171 of the General Business Law) and, in the event that any licensee was guilty of any infraction of the law, his license was subject to revocation (Sec. 170 of the General Business Law).

Under Sec. 173 of the General Business Law it is made a misdemeanor to engage in the business of selling any such ticket or other evidence of the right of entry without having first procured the license prescribed and the filing of the bond required by the quoted law.

### **The Facts.**

The plaintiff herein has filed a bill of complaint in this Court asserting that it had duly complied with the law by the filing of the bond prescribed and the receipt of the license from the Comptroller of the State of New York to engage in the business of the re-sale of theatre tickets. It asks, through injunctive relief, to be relieved of the restrictions of the statute of the State of New York upon the ground that

“Eleventh: Chapter 590 of the Laws of 1922 is unconstitutional and void and each and every section

thereof is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the law."

There is no allegation in the bill of complaint that the advance of Fifty Cents permitted to be charged does not give an adequate return to the plaintiff. There are no facts presented rebutting the presumption that such adequate return has been provided for by the legislation in question. The attack upon the statute is made as a whole and the prayer for relief is that a permanent injunction issue restraining the enforcement of such statute and each and every part and section thereof.

## POINT I.

**The business of conducting a theatre or place of public amusement is affected with a public interest, justifying the exercise of the police power of the state.**

As stated by this Court in *Munn vs. Illinois*, 94 U. S. 113, 126:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public to the common good, to the extent of the interest he has thus created."

Applying the principle stated above, it has been uniformly held that the conduct of a theatre is a business affected with a public interest.

As said by the Court of Appeals in *People v. King*, 110 N. Y. 418:

“The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.”

In *Aaron v. Ward* (203 N. Y. 351) the Court said [pp. 355-356, 357]:

“In several of the reported cases the keeping of a theatre is spoken of as a strictly private undertaking, and it is said that the owner of a theatre is under no obligation to give entertainments at all. The latter proposition is true, but the business of maintaining a theatre cannot be said to be ‘strictly’ private. In *People v. King* (110 N. Y. 418) the question was as to the constitutionality of the Civil Rights Act of this state which made it a misdemeanor to deny equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theatres or other places of public resort or amusement regardless of race, creed or color, and gave the party aggrieved the right to recover a penalty of from fifty to five hundred dollars for the offense. The statute was upheld on the ground that under the doctrine of *Munn v. Illinois* (94 U. S. 113) theatres and places of public amusement (the case before the court was that of a skating rink) were affected

*with a public interest which justified legislative regulation and interference* (Italics ours) \* \* \* That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private.”

In *Opinion of Justices to the Senate* (247 Mass. 589, 595), it is said:

“In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theatres and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. *People v. King*, 110 N. Y. 418, 428; *Donnell v. State*, 48 Miss. 661, 680, 681; *Aaron v. Ward*, 203 N. Y. 351, 356. See Civil Rights Cases, 109 U. S. 3, 41, 42.”

In *People vs. Weller*, 237 N. Y. 316 (affirmed by this Court, 45 Sup. Ct. Rep. 556) this principle was applied in affirming the constitutionality of the statute involved in the instant case.

This public interest furnishes the reason for state license and regulation of theatres and places of public amusement.

In *People ex rel. Duryea v. Wilber* (198 N. Y. 1, 9), the Court said:

“Licenses have been required for theatres and places of public amusement in this state for nearly a century. \* \* \* The tendency of such places is to attract a crowd, and it is said that they require more or less of governmental supervision and regulation.”

In *Mutual Film Corp. v. Ohio Indus'l Comm.* (236 U. S. 230), at page 244, this Court said:

“As pointed out by the District Court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation.”

## POINT II.

**The business of reselling theatre tickets is so closely connected with the business of conducting the theatre that it is likewise subject to state regulation and control.**

As attending places of amusement constitutes one of the chief means of recreation of the inhabitants of the city and the business of ticket selling is closely connected with that of conducting places of public amusement, and as the business of conducting a theatre is a business affected with a public interest, it naturally follows that the business of ticket selling is one which properly comes within the power of the State to regulate and to require a license to carry on such business. In particular the State has this power, if abuses have developed in the business as it is ordinarily carried on.

The distribution of tickets is very largely in the hands of ticket brokers. It is easy to see that these ticket brokers have many opportunities for practising fraud upon and deceiving the public. The ticket broker might sell tickets to persons for seats already sold to other persons. He might discriminate against particular persons or classes of persons in selling and distributing the tickets. He might sell tickets for places of amusement that are closed or for shows that are not running. He might deceive the persons as to

the location of the seats. And his business being generally conducted at a place distant from the theatre, the purchaser will very often have difficulty in obtaining redress.

To quote the words of this Court in *Brazee v. Michigan* (241 U. S. 340, 343):

“The general nature of the business is such that unless regulated many persons may be exposed to misfortune against which the legislature can properly protect them.”

In *People vs. Weller*, 237 N. Y. 316 (affirmed by this Court in 45 Sup. Ct. Reps. 556), the Court, adopting its previous language in *Collister vs. Hayman*, 183 N. Y. 250, 254, defined on page 327, a ticket speculator as follows:

“A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least \$4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the City of New York are equally successful, the additional expense to theatregoers must be very

large. The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, will leave the patrons of the theatre 'to the mercy of speculators.' "

The business conducted by the plaintiff is that of an ordinary theatre ticket speculator. Although the methods of the plaintiff may differ from those of the speculator who solicits his purchasers at the doors of the theatre, the resale feature of the business is the same. As appears from the bill of complaint, large blocks of seats in theatres, which would ordinarily find their way to the public through ordinary box office channels, are purchased by the plaintiff with the sole view of re-selling them to the demanding public at a price in excess of that which could be obtained therefor from the box office.

The same vice in the business of the plaintiff exists as in that of the ordinary ticket speculator;—to make money from the patrons of theatres and to oblige them, in order to secure available seats in theatres or other places of amusement, to pay an advanced and probably exorbitant price therefor. The business is one which does not have the respect of ordinary business dealings, and because of the injury and actual harm done to the public at large, is peculiarly subject to legislative regulation and control. As the Court of Appeals in the *Weller Case* stated, page 329:

"The legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which, at least in part, are not desired by the public, especially where such acts occur in a business which is measurably affected with a public interest."

These abuses in this business of ticket selling is evidenced by the legislation that has been passed in the various states. (*People v. Thompson*, 238 Ill. 87; 119 Northeastern Reporter 41, and cases cited).

During the year 1923 at least two states, Illinois and New Jersey, passed statutes as to the sale of tickets to places of amusement.

Laws of Illinois, 1923, pages 322, 323;

Laws of New Jersey, 1923, page 143, ch. 71.

During the following year, 1924, while a similar bill was pending in the Massachusetts Senate, the advice of the Justices of the Supreme Judicial Court of that State was sought on the constitutionality of the bill. In a carefully considered opinion, in which the opinion of the New York Court of Appeals in the case at bar was referred to, the Senate was advised that the bill, if enacted into the law, would be constitutional. See:

*Opinion of Justices to Senate*, 247 Mass. 589.

Thereafter, an act was passed, containing the substantial features of the proposed bill. See:

*Acts and Resolves of Massachusetts for 1924*, c. 497, p. 551.

This conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare as to require legislative regulation cannot be accidental and without cause.

The language of section 167 of the statute under consideration indicates legislative investigation of the subject of selling theatre tickets and the necessity of regulation,

"for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

The determination of the legislature "is entitled at least to great respect" (*Bloch v. Hirsch*, 256 U. S. 135, 154).

As this Court stated in *Middleton v. Texas Power & Light Co.* (249 U. S. 152, 157):

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."

An illuminative case is the *German Alliance Insurance Company vs. Lewis*, 233 U. S. 389, in which case this Court reviewed the numerous authorities giving examples of legislative powers exerted in the public interest in the regulation of business which affected the public generally in which the ever-existing police power of government exercised for the public good was declared to be fully within the limitations of the Constitution of the United States. After this review, the Court, per Mr. Justice McKenna, stated:

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the *Budd Case* (117 N. Y. 27, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those

affected, cannot be supported. "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation." "

The opinion concluded with this important quotation:

"Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power."

The latter quotation was reaffirmed by the Court of Appeals of the State of New York in *Biddles, Inc. vs. Enright*, 239 N. Y. 354, in which the regulation of the business of public auctioneers was sustained in which case the Court stated (page 365):

"Reasonable minds may differ as to its necessity, but where from one side of the argument it appears to be reasonable, and furnishes a fairly good opportunity to accomplish a public benefit or remove an evil, the court should not interfere with its enforcement by declaring it unconstitutional."

## POINT III.

**The power of regulation includes the right to prescribe a reasonable charge to the public for the service rendered.**

In *Bloch v. Hirsch* (256 U. S. 135, 157), the language of the Court was:

"But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulations has been settled since *Munn v. Illinois*, 94 U. S. 113."

The business of ticket selling stands substantially on the same footing as the grain elevator and like cases (*Munn v. Illinois*, 94 U. S. 113). It comes directly within the principle of the *Munn* case (*supra*)—the principle of which has not only been adhered to but expanded and advanced to meet conditions as they arise. There it was held that the State could fix a maximum charge for storing and elevating grain. The basic ground of the decision was that the business was one affected with a public interest, and that, hence, a reasonable charge for the service rendered could be prescribed.

In speaking of the police powers, the Court said [p. 125]:

"Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers,

hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

The decision in the *King* case (110 N. Y. 418) was based largely upon the decision in the *Munn* case; and it establishes the proposition that places of public amusement fall in the same category as those businesses referred to in the opinion in the *Munn* case.

It is submitted that the cases usually cited (*People v. Steele*, 231 Ill. 340; *Ex parte Quarg*, 149 Cal. 79) as to the sale of theatre tickets do not contain the price restriction feature such as the case at bar (*Opinion of Justices to Senate*, 247 Mass. 589, 597).

It will be observed in these cases the legislation condemned, either (a) prohibited the business altogether or (b) prohibited the exacting of any additional charge. But that is an altogether different proposition from prescribing a reasonable charge for the service (*vid. People ex rel. Cort Theatre Co. v. Thompson*, 238 Ill. 87; 119 Northeastern 41, 43-45; *People v. Weller*, 207 N. Y. App. Div. 337, 353; *Opinion of Justices to Senate*, 247 Mass. 589).

That the Legislature may fix a reasonable maximum charge for the service where the matter is one in which the public has an interest has been settled by the decision in the

*Munn* case. The *Munn* case has been frequently followed, approved and extended.

*Budd v. New York*, 143 U. S. 517.

*Brass v. Stoeser*, 153 U. S. 391.

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389.

Due investigation by the Legislature has determined that an advance of Fifty Cents over the box office price of tickets will insure an adequate return to any person engaged in the business of re-selling such tickets.

As the Court in the *Weller* case pointed out at page 330:

“It permits the brokers to charge an advance of Fifty Cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale. It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy.”

After further argument of the basic principle that the Legislature has at all times the right to regulate prices charged in connection with a business of public concern, the Court, in the same case, concluded its opinion with the following pertinent extract:

“The existence of extortion due to present unregulated conditions in the business of re-selling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest. The legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the legislature the responsibility of determining whether the remedy is wise and will promote the public welfare. The courts are called upon to determine only whether the legislature has acted within its powers in enacting this legislation; the judges have no disposition and the courts have no right to pass upon the wisdom of its exercise.”

After the determination by the Court of Appeals in the *Weller* case, an appeal was taken to the United States Supreme Court and the determination by the Court of Appeals was affirmed (*Weller vs. The People of the State of New York*, decided May 25th, 1925, 45 Sup. Ct. Rep. 556).

The business of dealing in the re-sale of tickets to places of amusement has no reason for its existence other

than that of making money at the expense of the public. The ability of ticket speculators to obtain tickets in block and the removal of such tickets from the ordinary channels of purchase renders this form of extortion peculiarly easy of accomplishment. Whatever excuse there may be for the continuance of such a business is amply compensated for by legislative permission to re-sell such tickets but not over the sum of 50c in advance of the box office prices. This insures adequate compensation for any trouble that the re-sale may incur. For this Court to interfere judicially with the administration of the criminal law of the State of New York, by practical judicial repeal through injunction of a part of the criminal law designed for the protection of the public, would reinstate in the State all that fraud, extortion, extortionate rates and similar abuses which the Legislature has found to exist and against the continuance of which it has sought to safeguard the public. Nothing is presented in the bill of complaint or papers in support thereof, which has not been heretofore fully considered by the authorities quoted in this memorandum, particularly in *People vs. Weller, supra*.

#### POINT IV.

**No question of adequacy of return is present in this case.**

The Court of Appeals in the *Weller* case, *supra*, has determined that the fifty-cent advance prescribed presumptively an adequate return to the licensee. There is no denial of this fact in the appellant's moving papers. Appellant's case is solely predicated upon the unconstitutionality of the statute as an entirety. No discussion of adequacy of return is therefore required.

## POINT V.

**The court will not interfere through injunction with the operation of the Criminal Law of the State of New York.**

Violation of the State Statute will involve a criminal procedure for the enforcement of the penalties prescribed by the Act. A Court of Equity will not interfere with such criminal prosecution where the injury inflicted or threatened is merely the vexation of arrest and punishment of complainant, who is left free to litigate the question of unconstitutionality of the statute or its construction and application. *Giglio vs. Barrett*, 207 Ala. 278.

The proper remedy is indicated in *Dalton Adding Machine Co. vs. State Corp. Comm.*, 213 Fed. Rep. 889, affirmed 236 U. S. 699. The question should be determined by the highest court of the State, after the institution of proceedings by the proper State authority and finally, if there be a constitutional question involved, by appeal to the Supreme Court of the United States. As stated under the authority last quoted: "This court cannot in advance of the proposed action by the corporation commission, see its way clear that that body will not give complainant a fair and impartial hearing."

It will, likewise, be presumed that the appellant will receive full justice in the Courts of the State of New York, in any prosecution for a violation of the State statute. The proper procedure was taken in the *Weller* case, *supra*, in which an appeal was taken to this Court from the determination of the Court of Appeals of the State of New York. In advance of the determination of the highest court of a

state, no determination should be made involving a state statute of purely local application.

# CONCLUSION.

**The decree appealed from should in all respects be affirmed with costs.**

Respectfully submitted,

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